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No.

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1993

DAVID CHARLES DeLONG, *et. al.*,

Petitioners,

vs.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, *et. al.*,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In an action under Labor-Management Reporting & Disclosure Act (LMRDA), 29 U.S.C. Section 411(a)(1), for denial by a union organization of its members' right to cast meaningful votes upon a collective bargaining contract, should the burden of proof of proximate cause shift from Plaintiffs to the wrongdoers when the number of disenfranchised voters exceeds the overall margin of votes favoring passage of the contract ?

PARTIES TO THE PROCEEDING

The parties to the proceeding in the Sixth Circuit are DAVID CHARLES DeLONG, STEPHEN SCHNEIDER, ADRIENNE EDINGTON, ROGER WILHELM, BOBBIE GROSS, PAUL SKILES, GARY DAY, LORETTA S. SHOEMAKER, all of the above Petitioners on behalf of themselves and all others similarly situated, and INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA and K. DAN JACKSON, Respondents.

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Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The judgment and decision in this case of the Sixth Circuit and the trial court provided in the Appendix (A-18 and A-47 respectively) were not reported.

BASIS FOR JURISDICTION

The initial judgment of the Court of Appeals for the Sixth Circuit was filed August 20, 1993. A timely petition for rehearing *en banc* was filed September 2, 1993, no vote was taken to hear the case *en banc*, and the original panel denied rehearing by Order filed October 5, 1993. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Labor-Management Reporting and

Disclosure Act (LMRDA) [29 U.S.C. §411(a)(1)], providing in pertinent part:

> Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates, to vote in elections or referendums of the labor organization, to attend membership meetings, and to participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations in such organization's constitution and bylaws.

STATEMENT OF THE CASE

This case arises from violations of rights guaranteed the Petitioners under the LMRDA as well as the Constitution of Respondent International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (hereafter "Union" or "UAW") in ratifying a collective bargaining agreement (hereafter CBA) between the UAW and Petitioners' employer, Navistar Transportation Company (formerly International Harvester Company,

hereafter "Navistar"). Respondent K. Dan Jackson is an elected UAW union official sued individually.

In 1984, Petitioners as Plaintiffs brought a class action alleging, *inter alia*, that they and all 4540 members of Local 402, affiliated with UAW, were denied the right to cast meaningful votes on the ratification of the 1982 CBA negotiated by the UAW with Navistar. The case was in effect trifurcated. One lengthy trial was on the statute of limitations defense. The second trial dealt with the liability issue for violations of the right to cast meaningful votes on the CBA guaranteed by the LMRDA [29 U.S.C. §411(a)(1)] as well as the UAW Constitution. Following resolution of the issue of statute of limitation, by an oral order made in the course of a telephone pre-trial conference, the trial court

bifurcated the trial further into separate trials on liability and damages. No written decision was ever filed.

On liability, the jury found that the UAW, and K. Dan Jackson, had denied the entire class of 4540 Local 402 members the right to cast meaningful votes on the CBA. The CBA was ratified at Local 402 level by a vote of 948 to 842. Only 1790 Local 402 union members (mostly working) participated in the voting out of a total of over 4540. Nearly 2000 member of Local 402 who had been laid off at the time had no idea votes were to be cast at the meeting. Those that did vote were misrepresented to regarding the contents of the CBA. The jury held that all members of the class, 4540 people, working and laid off, were denied the right to cast meaningful votes on this CBA. The national vote was 7086 to 3949.

Subtracting the Local 402 vote from the national vote, the result of voting in the other locals was 6138 to 3107, a margin of 3031. Obviously if 4,540 Local 402 members, the certified class, properly notified and/or fully and accurately informed of the contents of the CBA, had shown up at the meeting and voted decidedly against it, the CBA could have been decisively rejected. The key legal issue raised in this Petition is: Whose burden is it to prove whether or not this would or would not have been the case? At the end of the testimony, the court presented all counsel with an instruction and a corresponding interrogatory which placed the burden of proof of proximate causation upon the Petitioners. This interrogatory was to be answered by the jury *after* it had answered in the affirmative the interrogatory that

Plaintiffs' right to cast meaningful votes had been violated. In essence this course of action forced Plaintiffs to further prove to the jury how many members of the class would have turned out and how they would have voted.

REASONS FOR GRANTING THE WRIT

I. THIS CASE PRESENTS AN IMPORTANT QUESTION OF LAW LIKELY TO RECUR AND ADVERSELY AFFECT NATIONAL PUBLIC POLICY BECAUSE FAILURE TO PLACE THE ONUS OF PROVING PROXIMATE CAUSE ON THE PARTY WHICH COMMITS THE VOTING VIOLATIONS WILL HEREAFTER RENDER THE LMRDA PROTECTIONS "PRACTICALLY WORTHLESS"

In 1968, in *Wirtz v. Hotel Employees Union*, 391 U.S. 492 (1968), a case involving violations of statutory procedural safeguards in union officer elections incorporated in the LMRDA (though in Section IV and not Section I) this Court shifted the burden of proof on proximate cause to the union organization stating that not to do so would make the

statutory election law's procedural protections "practically worthless". The very fact it had been proved that the union violated the election laws was held sufficient to establish a *prima facie* case such violation *may* have affected the outcome and that once such violation had been established the burden was then upon the union organization to prove this would not have been the case. The union members were not required to show that the violation actually affected the outcome of the election. "The difficulty of proving such an actuality would be so great as to render the professed remedy practically worthless." 105 Cong.Rec. 19765 (1959) cited with approval in *Wirtz*, 391 U.S. at 506. The Court adopted the "*may* have affected standard" not solely because of the statutory provisions obligating it to do so but also because it was the only

legal and rational solution, stating:

> But in the cases at bar, the alleged violations caused the exclusion of willing candidates from the ballots. In such circumstances, there can be no tangible evidence available of the effect of this exclusion on the election; whether the outcome would have been different depends upon whether the suppressed candidates were potent vote-getters, whether more union members would have voted, candidates not been suppressed, and so forth. Since *any proof relating to effect on outcome must necessarily be speculative*, we do not think Congress meant to place as stringent a burden on the Secretary as the district courts imposed here. *Wirtz*, 391 U.S. at 507 (Emphasis Supplied).

Similarly, the practicalities of proving how many of the 4540 in this case *would* have turned out to vote and how they *would* have voted would even in the best circumstances be extremely difficult for either side. Placing the burden on the Plaintiffs would create a situation where the wronged parties would receive only a "Phyrric" victory, with no redress for the proven wrong, and would let a proven

wrongdoer escape suffering consequences of its wrongdoing. If this issue is left unresolved future plaintiffs will be inhibited from challenging even the most egregious actions of union organizations.

More importantly if union organizations know that even if they ignore the rights of the rank-and-file with impunity it will be virtually impossible for Plaintiffs to recover any damages because of the near impossible burden of proof imposed by the Courts upon such Plaintiffs, will such organizations be inclined to follow the law? What human being could then possibly find as a *fact* how many of the 4540 people would have turned out to vote May 1, 1982 and how they would have voted. Clearly the class was statistically large enough to have had the potential or the capacity to vote down the 1982 CBA. Yet this special verdict

required the jury to *speculate* how many members would have showed up and how they would have voted. Only by granting this petition, and formulating a proper standard for this and future cases, can this Court bring to the conduct of union affairs and to the rank-and-file the reality of exercising the rights guaranteed by LMRDA.

LMRDA was "the product of congressional concern with widespread abuses of power by union leadership." *Finnegal v. Leu*, 456 U.S.431, 435 (1982). In enacting LMRDA the legislature intended "to guarantee every member equal voting rights, rights of free speech and assembly, and a right to sue." *United Steelworkers of America v. Saddowski*, 457 U.S.102, 109 (1982). The Court has recognized the interplay between the various parts of LMRDA and concluded that

"The pervading premise of both these titles (Title I and Title IV, Labor-Management Reporting and Disclosure Act of 1959) is that there should be full and active participation by the rank and file in the affairs of the union." *Musicians Federation v. Wittstein*, 379 U.S.171, 182-83 (1964). LMRDA was described as "a command that members and classes of members shall not be discriminated against in their right to nominate and vote." *Calhoon v. Harvey*, 379 U.S. 134, 139 (1964).

The facts of this case call for adoption of a burden shifting approach leading to concrete remedies. In this case, extensive testimony demonstrated the UAW (a) confined notification of the May, 1982 meeting only to working members of Local 402, conveniently ignoring those laid offs eligible to vote; (b) issued

ambiguous notification describing the scheduled meeting in such a manner as to confuse those as to whether voting would take place; (c) provided only a bare summary which glossed over the important and controversial elements of the radical proposed changes; (d) provided only a short time between the conclusion of the negotiations and the ratification vote; (e) caused the meeting to be presided over by an individual incapable of conducting the meeting in an appropriate manner; (f) made statements during the meeting through agents of the UAW that substantially underemphasized detrimental effects of the proposed modifications on the rights of Local 402 members; (g) encouraged voting prior to completion of the deliberations; (h) had Local 402 members simultaneously ratify Master and Local Contracts despite knowledge that these were inherently

inconsistent with respect to seniority; (i) did not provide satisfactorily operating microphones for proper deliberations; (j) disregarded specific instructions from Local 402 members not to enter into any negotiations with the company with respect to seniority; (k) ignored an express formal request from Local 402 members for a week to consider and review the proposed modifications before holding a ratification vote; and (l) last but not the least, by its agents made misrepresentations to Local 402 union members. The above summary of the testimony is provided to give the Court perspective as to the severity of potential voting right violations that can occur again and again and go without redress if this writ is not granted.

The nature of the LMRDA "meaningful vote" claim dictates that violations as

egregious as these in contravention of a "fundamental" right, as "core" to unionism as the federal Bill of Rights is to democracy, be remedied. This can only be done by placing a difficult burden of proof such as the speculative outcome of voting behavior upon the violators who create the need to engage in such speculative proof rather than on the victims. The trial court should have made a legal determination that a *prima facie* case had been presented due to the quantum or number of denied union member meaningful votes such that the outcome "may have been affected". Not to do so would make this fundamental "core" right "practically worthless".

Indeed burden shifting should apply with even more vigor to cases like the one at the bar than in LMRDA Title IV officer election cases. The fundamental premise of

the LMRDA Section 411 Bill of Rights is "to assure to union members a basically democratic union organization with the concomitant protections against arbitrary and despotic control by union leaders". *Schuchardt v. Millwrights*, 380 F.2d 795, 797 (10th Cir. 1967). Especially when violations of both LMRDA rights as well the union organization's own Constitution, as is the case here, strike at the very heart of union members' quality of life at work by depriving them of long-cherished seniority rights, burden shifting proximate cause should apply. Setting aside elections for a secretary or other officers of the union pale next to the importance of changing union members' contractual seniority rights affecting the entire life work duration of 4540 people. *Reed v. United Transp. Union*, 488 U.S. 319 (1989), determined the "core purpose" of

the LMRDA to be "enhancing union democracy" through enforcement of the rights of union members, not of "protecting the integrity of collective bargaining or of grievance-and-arbitration procedures". (*Reed, supra,* 488 U.S. 319, 331, ft 6.) Congress had perceived that provisions defining unfair labor practices by labor organizations had failed to provide necessary protections for union members it considered "essential to the democratic operation of unions." *Reed,* 488 U.S. at 332. *Reed* recognized the "national interest" of fundamental LMRDA "Bill of Rights" was of "greater importance than an employee's interest in setting aside an individual settlement under a collective bargaining agreement." *Reed,* 488 U.S. at 331. By vindicating LMRDA personal rights union members are "contributing to the improvement or preservation of democracy

within the union." *Reed*, 488 U.S. at 326.

This national interest cannot be achieved if meaningful vote rights are rendered "practically worthless". No rights can exist without the right to a meaningful vote, as *every right* can be taken away or granted by voting.

II. GRANTING CERTIORARI WILL GIVE THE COURT THE OPPORTUNITY TO MAKE FEDERAL LABOR LAW CONSISTENT WITHIN ITSELF AND WITH ELECTION LAW GENERALLY.

In the area of public elections the Courts have found the voting rights to be so fundamental to the essence of a democratic society as to require "proximate cause" satisfied if the number of those disenfranchised when compared to the margin of victory could have affected the results of the elections and *possibly* affected the outcome. *Hadnott v. Amos*, 394 U.S. 358 (1969). *Hamer v. Campbell*, 358 F.2d 215 (5th Cir. 1966) *Toney v.*

White, 488 F.2d 310 (5th Cir. 1973)

These public elections cases are of general application in terms of representative democracy. There is no reason why the laid-off union workers of the nineties should not be entitled to similar protection when as a result of the acts or omissions of union organizations they are denied rights which strike at the heart of union democracy.

III. THE GRANT OF CERTIORARI IN THIS CASE WILL PROVIDE THE COURT WITH AN OPPORTUNITY TO CLARIFY AND RATIONALIZE LMPDA LAW GOVERNING PROXIMATE CAUSE AND BURDEN SHIFTING.

One need not go from the LMRDA to find Sixth Circuit caselaw shifting burden of proof of "outcome" upon a union Defendant in Title I cases after a *prima facie* showing by the Plaintiff of violation of LMRDA protected "Bill of Rights" by the union organization. *Black v. Ryder/P.I.E. Nationwide, Inc.*, 970 F.2d

1461 (6th Cir. 1992) considered LMRDA Title I free speech violations of 29 U.S.C.A. §411(a)(2), and held that when a Plaintiff union member meets his burden of proving his *prima facie* case that the defendant union took actions against him in substantial part because of this exercise of his speech rights under the LMRDA, the Court then must engage in a "burden-shifting approach" and require the union "to justify its disciplinary actions against its member..." *Black*, 970 F.2d 1461, 1469-1470. The Sixth Circuit adopted from *outside* labor law the burden shifting "free speech" analysis of fundamental speech rights of *Mt. Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977) If it is proper in *Black, supra*, to look outside the LMRDA to free speech cases to apply burden shifting rules by analogy in the free speech context of LMRDA, 29 U.S.C.

Section §411(a)(2), it certainly is proper to analogize the "may have affected" burden shifting approach of LMRDA Title IV to Title I LMRDA § 411(a)(1) meaningful votes cases.

Subject to reasonable union rules, LMRDA Title I directly affects provisions in Title IV relating to election of officers by guaranteeing: (a) equal rights in nominating, voting, etc.; (b) freedom of speech and assembly and expression of views on election candidates; (c) protection of right to sue, appear as a witness, petition legislators; and (d) against improper disciplinary action by a union or any of its officers. *Electing Union Officers*, U.S. Department of Labor, Office of Labor-Management Standards, page 24 (1989 publication).

To contend that there exists a permanent and definitive dividing line

acting as a barrier between Title I and Title IV simply because of certain language used by Congress under one title and not under the other, and to use this as a basis for supporting the argument that burden shifting should not take place because of this in a wide range of cases involving union misconduct, is not only incongruous but inconsistent with congressional intent.

IV. SHIFTING BURDEN OF PROOF TO WRONGDOERS PROTECTS THE PUBLIC INTEREST.

"The public has an interest in assuring that unions which have taken on a fiduciary duty with respect to workers in the United States, and in which those workers have placed their trust, do not abuse their power." *Patrick v. McCarthy*, 743 F.Supp. 894, 901 (D.D.C. 1990). Section 101(a)(1) of the LMRDA serves the "core function of enhancing union

democracy" and that function must not be ignored. *Reed, supra,* 488 U.S. 319, 321, ft 6. (1989). The public needs assurances that internal union problems do not affect the national economy. Though somewhat in decline recently, unions still have a major impact on the economy. In 1992 there were 16.4 million wage and salary employee union members. The number of major work stoppages and amount of idleness are at the lowest levels recorded since 1947. *Monthly Labor Review,* March, 1993, Volume 116, No. 3, page 2.

If union members increasingly become disenchanted with the democratic nature of their own institutions, will they continue to be favorably disposed towards voting for likely future concession packages like the one which is the subject matter of this litigation when these packages or "give-aways" as they have come to be known

are negotiated by entrenched despotic union leaders? Or is it more likely that such union members are going to become alienated and available for manipulation by "revolutionaries" with consequential adverse impact upon stability in union-management relations?

V. THE COURT OF APPEALS DECISION LEAVING THE DECISION OF THE DISTRICT COURT STAND RESULTS IN A CONFLICT WITH DECISIONS IN OTHER CIRCUITS

Consideration by this Court is necessary on the independent ground that the holding below conflicts squarely with decisions in other circuits which in LMRDA meaningful right to vote cases under Section 101(a) have placed the burden of proof of proximate causation on the Defendant Union after a *prima facie* showing that there were sufficient votes that "may have affected" the outcome. These other circuits adopted the standard

set in Title IV of the LMRDA.

1. *Alvey v. General Elec/ Co.*, 622 F.2d 1279 (7th Cir. 1980) involved union members that proved violations of LMRDA rights by their union in contractually modifying seniority rights without a meaningful vote at a ratification meeting due to a large number of laid off members being disenfranchised by being barred from attending to vote and speak out on issues. As to the proximate cause issue, the Seventh Circuit evidently treated it as a legal issue and reached its own judgment noting that:

> It is *pure speculation* to suggest that the presence of the very employees whose rights were being compromised *might* not have changed the result. *Alvey*, 622 F.2d at 1285, ft. 6. (Emphasis supplied).

The Seventh Circuit also pointed out that though it was not applying Title IV regulations to Title I cases, it did find

some of the underlying justifications were "fundamental and provide guidance in areas beyond Title IV." *Alvey*, 622 F.2d at 1286, ft. 6. The Seventh Circuit adopted Title IV principles by analogy, stating:

> The Supreme Court has indicated that the test of reasonableness under Title IV of the act (which deals with the election of officers) (section 411 is a part of Title I) is a balance between the anti-democratic effects" of the challenged rule and the "[union] interests urged in its support." (citation omitted) Since the good standing rules are challenged here as applied to bar a group of members from voting, we see no principled reason why that test should not also guide our inquiry in this case. *Alvey*, 622 F.2d at 1285.

The Seventh Circuit in *Alvey* was not just guided by its own perception of the unfairness of the application of the good standing provision in the circumstances of the case which permitted some union members to benefit and protect themselves at the expense of other members of the same union while they were temporarily

laid-off, but was also mindful of the policy against judicial interference in the internal affairs of the union and "fully conscious, and with respect for interests that underlie that policy." *Alvey*, 622 F.2d at 1285.

2. The Ninth Circuit decision in *Marshall v. Teamsters Local*, 468 F.2d 575 (9th Cir. 1980), involved a proven violation of LMRDA, 29 U.S.C. §481(c), and held a new supervised election was requiring on the basis that the violation may have affected the results. Relying upon it, *Bauman v. Presser*, 117 LRRM 2393 (D.D.C. 1984) found a violation of the meaningful right to vote in the context of a ratification meeting when it found that the denied votes were sufficient in number that it "may have affected" the outcome. The Bauman Court explicitly indicated that it was adopting the "may have affected"

standard required statutorily for elections under LMRDA Title IV, stating:

> "Although Marshall involved a union election for officers regulated by Title IV of the LMRDA, the Court is persuaded that the general principles enunciated therein are equally applicable to this case". *Bauman,* 117 LRRM 2393, 2400 at ft. 34

The Bauman Court noted the contract:

> "passed by the close margin of 52%-48%; plaintiffs' opposition *could* easily make a significant difference in the outcome of the referendum." *Bauman,* 117 LRRM 2393, 2399 at ft. 32 (Emphasis supplied).

3. The Fifth Circuit Court of Appeals in 1981 affirmed *Christopher v. Safeway Stores,* 476 F. Supp. 950, 103 LRRM 2017 (E. D. Tex 1979) *affd.* 644 F.2d 2554 (5th Cir. 1981). The trial court refused to require the Plaintiffs to prove "outcome determination". It held proof unnecessary that changes in the contract "would" have been rejected by the members. *[Christopher,* 103 LRRM 2017, 2020],

stating:

> We do not believe that lack of evidence on the *hypothetical question of how the members would have voted* in 1973 if Local 504 had complied with their statutory duty forecloses recovery of lost wages by the Appellees. See *Trail, supra*. The jury could properly assess lost wages as being appropriate relief under 412 for infringement of membership rights by Local 504 without considering *speculation as to what would have happened* had the union properly put seniority change before the membership. *Christopher*, 103 LRRM at 2020. (Emphasis supplied).

In this case as well it would be pure "speculation" as to what would have happened had the union properly put the seniority change before the members. Juries find facts, they do not speculate on facts. It should be for the jury to decide liability and for the trial court to decide and rule on whether a *prima facie* case has been proved.

4. *Fight Back Committee v. Gallagher*, 120 LRRM 2372 (S.D.N.Y. 1985)

involved By-Laws changes were adopted in a manner that violated union members' Section 411 meaningful right to vote. As in this case, a jury had found liability by specific findings. It applied the "may have affected" LMRDA Title IV standard in a LMRDA Title I "meaningful vote" setting, making findings of fact as a matter of law which it determined "may have affected the outcome". It did not place the burden of proof upon the Plaintiffs to show how members would have voted. It required only a showing that there were sufficient number of denied meaningful votes that "may have affected" the outcome. Further, as should have been done in the case at bar, the Court made that finding after a jury trial as a matter of law once the fact issue of whether the Plaintiffs' LMRDA rights had been violated had been decided. That jury was not permitted to

speculate on the hypothetical issue whether or not the vote "may have been affected" by the defendants' violations of those Plaintiffs' rights, because the issue of going forward, burden shifting, and whether a *prima facie* case is proven are questions of law.

5. *Thompson v. Union of Flight Attendants,* 109 LRRM 2871 (D.C. Ca. 1982) is another Section 411 (Title I - LMRDA) meaningful right to vote case in the context of ratification vote on an assessment. It relied upon LMRDA Title IV union officer election cases to apply a "may have affected" outcome standard, when relying upon a Third Circuit LMRDA Title IV union officer election case [(*Marshall v. Steelworkers Local 12447,* 591 F.2d 199 (3rd Cir.1978)] which required shifting of the burden of proof to the union once Plaintiffs had made a *prima facie* showing.

However, it found the Plaintiffs were just 5 votes short of making a *prima facie* case. The union member vote had been 581 in favor to 559 against, a 22 vote margin. By Court order, questionnaires sent to non-voting members indicated 23 people did not get a ballot. Five of those 23 were ineligible to vote. Therefore Plaintiffs could not satisfy the burden of going forward - i.e. as a matter of law, they could not prove a *prima facie* case that there were sufficient votes that may have affected the outcome.

Neither the union, nor the district court, nor the Sixth Circuit has uncovered a single case that did not place the burden of proof upon the union, once liability and sufficient affected numbers were demonstrated. Every case cited by the district court and the union to support the argument that a plaintiff should bear

the burden of proof on proximate causation in LMRDA meaningful votes cases were fair representation cases, not LMRDA cases. For example, the UAW in briefs before the trial court on this issue referred to *DeBoles v. T.W.A.*, 552 F.2d 1005 (3rd Cir. 1977) as "the seminal circuit decision requiring causation in overturning ratification votes." An examination of this "seminal" case shows the error in applying fair representation caselaw principles to LMRDA.

Deboles was a class action alleging breach of duty of fair representation. It did not involve LMRDA. It involved certain misstatements made to union members during the negotiating process, not the voting process. The context of liability for unfair representation is an area which leaves considerable latitude to negotiators and in which Courts are

reluctant to interfere absent bad faith or gross arbitrariness, but this has no relevance whatsoever to LMRDA actions. Questions of denial of meaningful vote as required under LMRDA due to lack of notice of a CBA ratification meeting and conduct of the CBA ratification meeting were not involved at all in *Deboles*. Most important of all, neither the *Deboles* Court nor the jury engaged in speculation, as in terms of numbers, there were just not enough votes to "make a difference" -- the Third Circuit finding:

> "Based on the total national vote, even if all Space Center voting members had voted "no", the contract would still have been ratified by a national margin of almost 3 to 1." *Deboles*, 552 F. 2d at p.1013.

In contrast, in the case at bar the number of members who had not been notified or whose LMRDA rights have been found to have been otherwise infringed was

larger than the margin of passage. By a massive "no" vote they had the potential to "make a difference" - their vote "MAY have affected" the outcome.

This Court in its opinion in *Reed, supra,* recognized the differences between LMRDA and such fair representation cases, and recognized that though LMRDA actions could potentially affect collective bargaining, fundamental Title I LMRDA claims nevertheless deserved to be placed on a higher plane than fair representation cases, stating:

> We note, nevertheless, that however direct an effect some Title I claims may have on the collective bargaining agreement or on private dispute resolution, Title I claims all serve the core function of enhancing union democracy through enforcement of the rights of union members, not of protecting the integrity of collective bargaining or of grievance-and-arbitration procedures. (*Reed, supra,* 488 U.S. 319, at 331, ft 6.)

Oddly, despite the clear authority

outlined above requiring a shift in the burden of proof on proximate causation, every one of which were cited numerous times in several briefs filed by Petitioners, the Sixth Circuit stated in its decision filed in the Appendix (page A-15) that the Petitioners "have failed to provide, nor have we found, any authority clearly supporting this position."

VI. GRANTING THIS WRIT WILL ENABLE THE COURT TO BALANCE THE TRADITIONAL POLICY OF NON-INTERFERENCE IN THE INTERNAL AFFAIRS OF THE UNION ORGANIZATIONS AGAINST THE GOAL OF ENSURING FREE AND DEMOCRATIC UNION ORGANIZATIONS.

Cases attacking a CBA on the basis of lack of fair representation have been harder to bring by union members due to the deference accorded to unions by recent caselaw, which makes it more important than ever that the process for the creation and modification of rights be democratic and fair. LMRDA provides a

cause of action that focuses only indirectly upon CBA's being voted upon (though that may be the catalyst for legal action) and instead has a primary focus upon the protected interest -- the vote and the voting process. Its core interest is a fundamental right vital to enhance union democracy and independence and protect the public interests and goals. It should not be made subordinate to transient interests based on expediency in the guise of the absolute "need" to ratify CBA's as quickly as possible.

Within the last few years this trend has reached a stage where it has become extremely difficult, if not impossible, for the rank-and-file to challenge the acts or omissions of the union organizations. As a result, the rank-and-file members are on the verge of becoming alienated rather than being an active

participant. Consider recent caselaw:

a) In fair representation cases when judging whether a union organization is liable, a court's review of the union's actions or omissions must be highly deferential and the Court can find for Plaintiffs only if the union's actions can be characterized as so far outside the range of reasonableness that those actions or omissions are wholly irrational or arbitrary. *Abrams v. Communications Workers of America, AFL-CIO,* 818 F.Supp.393 (D.D.C., 1993).

b) The union is liable only if proven in representing the member to have acted arbitrarily, discriminatorily, and in bad faith, as opposed to mere negligence. *Achili v. John J. Nissen Baking Co.,* 989 F.2d 561 (1st Cir.1993).

c) A union is not liable for filing a grievance verbally, rather than in writing

as required by CBA, causing the claim to be time-barred. An unwise or unconsidered decision by a union is not necessarily irrational and the union's actions may be challenged only if they are wholly irrational. *Walk v. P.I.E. Nationwide Inc.*, 958 F.2d 1323 (6th Cir. 1992).

e) The union may "issue the authoritative interpretation" of union's constitution provisions regrading internal remedies a union member must exhaust prior to seeking judicial relief. *Ackley v. Western Conference of Teamsters*, 958 F.2d 1463, 1477 (9th Cir. 1992).

Labor relations law has been before this Court numerous times in the past decade and is at a point in development in which the lower courts need specific guidance on the distinction between LMRDA and other labor statutes. As one of the three prongs to the LMRDA 411(a)(1) cause

of action, proximate cause and burden shifting is a critical issue which whem put in place will provide an important piece of the puzzle of developing sound labor law for the future. If the approach suggested by Petitioners is taken, a proper balance to the jurisprudence cited above can be attained as well as Congressional intent effectuated. The balance has decidedly shifted against the worker in recent years, especially at the UAW. A report of its Public Review Board, in the course of a report on UAW conduct during the 1986 election, noted:

> We cannot ignore the fact that the UAW is now, and has been for over twenty years... a one -party institution not in all respects unlike that found in many national governments in which a single political party controls the government, and the officials who formally make and administer the laws ... are selected wholly by that party. *"Democracy for Unions, Too?"*, THE PROGRESSIVE, June 1992, page 21, 23 (by Laura McClure)

The past candidate for the 1992 presidency of the UAW perhaps unwittingly blew the whistle that the UAW "sorely lacked" democracy by extensively expressing during an interview on the sidewalk in front of the union's Solidarity House in Detroit in late January, that:

> Bringing the union's leadership in tune with the corporate agenda leaves the rank-and-file workers out...This whole regime, this whole jointness arrangement, creates a resident union elite who are treated differently from the rank and file. It's company unionism--can't be anything but... At no time the rank-and-file membership of the UAW ever had a chance to democratically decide this massive change of direction from adversarialism to corporatism. *"Democracy for Unions, Too?"*, THE PROGRESSIVE, June 1992, page 21, 23 (by Laura McClure)

In such a state as described by one who sought to rise as an insurgent against such despotism, ensuring democratic process guaranteed by the union's "Bill of

Rights" has become ever more important, requiring this Court to take a hand in fashioning the democratic future of unions and their members.

In the circumstances and confronted with large, impersonal, bureaucratic international unions with entrenched leaders and their dictatorial tendencies, the rank-and-file have found themselves unable to influence the events and have ended up permitting the union organizations to operate virtually freely without any genuine limitations on their conduct. The only opportunity left for the rank-and-file to democratically influence the course of events is by voting, whether at the union elections or at ratification meetings. It is in the public interest to preserve the fairness and integrity of the ratification process. The Court must ensure that the rank-and-file have the

opportunity to meaningfully exercise this vote, if only to ascertain that such violations as have occurred in this case do not go unremedied. Remedies shape the significance of such rights. The policy of non-interference in the internal affairs of the union organizations must be balanced against the goal of ensuring free and democratic union organizations.

Granting this Petition for Certiorari is the last hope of millions of union members nationawide for creation of law that will nourish a rebirth of union democracy. If not, over time there would not be much difference between unions in the United States and various national single party dictatorships in the world.

VII. THE SIXTH CIRCUIT ERRED IN FAILING TO ADDRESS THE MERITS OF THE QUESTION RAISED BY THIS PETITION

The jury in Special Verdicts Numbers 1 and 2 found the class had proved

by the preponderance of the evidence that the U.A.W. and Jackson had respectively violated their right to cast a meaningful vote during the May 1, 1982, ratification meeting. Special Verdict Number 3 introduced the concept of "proximate cause" and asked the jury whether the Plaintiffs class had proved by the preponderance of the evidence that the Supplemental Letters would not have been adopted nationally had their rights to cast meaningful votes not been violated. The union wrongly has claimed that there has been a "waiver" pursuant to Federal Civil Rule 51 and therefore the merits raised should not be reached.

The jury by Special Verdict #3, was asked to render a factual finding whether the Plaintiff union members proved a certain fact, i.e. the outcome "would have been affected". The exact wording was:

> Has the class proven by the preponderance or greater weight of the evidence that the Supplemental Letters of Understanding would not have been adopted nationally if they and the class they represent had not been denied their right to cast meaningful votes.

In the case at bar, the jury finding on Special Verdict No. 3 is inconsequential, immaterial, harmless surplusage that cannot dispose of any legal issue because the fact does not relate to a proper defense, is not part of Petitioner's cause of action, was based upon an improper standard for burden of proof of an issue, was presented prematurely because the proximate cause issue was not at issue during this liability phase of this bifurcated trial, and improperly required the jury to speculate on a matter that was an issue of law solely for the Court. The jury simply can and should not decide that issue. This

jury finding is as "immaterial" whether it was raining under a full moon that day.

Whether the issue before this Court is called "proximate cause" or something else is not really the issue. The more precise question to be answered on appeal is whether the Petitioners correctly define this element as a legal issue, and thus who (plaintiff or defendant) must prove what to whom (judge or jury), and what legal effect this jury finding has to dispose of the case. It is critical to this analysis to note that the jury finding was not a general verdict.

It is not unusual that a trial court might fashion quite a number of factual issues for a jury to consider, none of which alone might be dispositive in the case. All the jury in this case was asked to decide was a fact. The crux of the issue in this case is what to do with that

fact. The answer is simple - nothing because it is immaterial surplusage. Proving the denial of meaningful vote necessarily proves "proximate causation" because the fundamental "protected interest" denied and damage suffered is the loss of *the vote*. The jury finding of denial of vote thus proves liability, causation and damage. What pecuniary losses resulted thereby was an issue bifurcated for a later date in the damage phase after the Court shifts the burden of proof of proximate causation to the wrongdoing union. Any claimed "waiver" by Petitioners in regard to the proximate cause issue being presented to the jury therefore is as well immaterial and should be ignored. There is ample precedent for treating as "surplusage" immaterial jury findings with no legal effect especially in an area of changing and evolving law.

See *Floyd v. Laws*, 929 F.2d 1390 (9th Cir. 1991); *Newell Cos.,Inc. v. Kenney Mfg., Co.*, 864 F.2d 757 (1988) *cert. denied* 110 S.Ct. 62, 107 L.Ed 2d 30 (1989), *Anchor Casualty Co. v. McGowan*, 168 F.2d 323 (5th Cir. 1948); FEDERAL RULES DECISIONS, Volume 44, page 338 "Federal Special Verdicts: The Doubt Eliminator;" by Honorable John R. Brown. *Instructions To Juries; In Civil and Criminal Cases.* § 111 at page 327. By Edward R. Branson, Third Edition; 1960 Bobbs-Merrill Company, Inc.; Austin Abbott, *Civil Issues Before A Jury*, Fifth Edition, § 424 page 903. The Lawyers Co-Operative Publishing Company (1935); Abbott, *Civil Jury Trials*, (5th Edition 1935), § 404 at page 925-926 . The maxim *utile per inutile non vitiator* endorses this concept and has repeatedly been utilized to achieve justice by rejecting

useless "surplusage" in "immaterial" special verdicts that find facts not dispositive to legal issues. Federal Rule of Civil Procedure 49(a) requires that the jury only make a finding "upon each issue of fact." If the jury decides an issue of law by error, to achieve justice the Court should ignore the finding as harmless technical error and thereby surplusage.

To prevent a miscarriage of justice, this Court may also ignore any claimed waiver of Federal Rule Civil Procedure 51 requirements. The Court may consider whether an instruction was proper despite no objection if the issue is a "novel, important, and likely to recur" issue of law. In *City of Newport v. Fact Concerts Inc*, 453 U.S. 247 (1981) this Court reviewed an unobjected to charge regarding punitive damages in 42 U.S.C. §1983 actions because the issue was "novel,

important, and likely to recur." The Petitioners contend that the above analysis demonstrates they meet that test. The reviewing Court is not restricted to the plain error standard. In *Virginia Backshares, Inc. v. Sandburg,* 501 U.S. ___, 111 S.Ct. 2749 (1991) the Court considered a proximate cause issue in a private securities law right of action involving proxy solicitation by means of false statements and found the issue of such "importance to administration of federal law" and in a "state of evolving definition and uncertainty" as to require review, even when it was not raised to the Court of Appeals. In *St. Louis v. Praprotnick,* 485 U.S. 112 (1988) (plurality opinion) this Court also reviewed the issue of proper standard for liability exposure of municipal employees under 42 U.S.C. §1983 despite lack of

objection to a jury instruction. This Court emphasized that the lower court did pass on the issue, and that review would give lower courts and litigants a fairer chance to craft future jury instructions that will not require scrutiny on appellate review. In this case, Petitioners timely moved for judgment, new trial and related relief arising out of the trial on the almost identical basis in this Petition. The trial court did not "duck" the issue. By Decision and Entry dated May 7, 1992 (A-21) it exhaustively analyzed the merits of the argument that the burden of proof on proximate cause should be shifted to the wrongdoers.

The analysis contained in this Petition demonstrates that much more is at stake here than in the other cases this Court has accepted for review applying the "novel, important, and likely to recur"

exception to waiver, as well as the cases applying the slightly stricter "plain error" standard to which those cases created an exception. The issue raised is of continuing importance, and should be resolved by this Court. LMRDA meaningful votes cases will present the particularly recurring issue of proximate causation because it has been, and more likely will be, an active area of federal labor law.

This case involves elected and dues paid union fiduciaries depriving a class of thousands of blue collar workers of their most fundamental right, the right to vote, and thereby causing these thousands to lose ten to thirty years of seniority, their sole security in today's workplace, hundreds of millions of dollars loss of wages and benefits, and prevented new hiring in their community for over a decade and perhaps even longer. Let us not

add to that wrong the deprivation of a right to at least be heard on the merits before this Court when those acts have been proven to a jury as violative of the law. Not shifting the burden of proof to the wrongdoer would render the LMRDA remedy "practically worthless."

CONCLUSION

This Court should grant this petition for certiorari, against this background, because this case presents a clear opportunity for the court to: a) resolve this issue; b) prevent courts in the future from erring on this important issue of law; c) bring clarity to an area of continuing importance to the federal courts and the labor movement; d) make LMRDA "Bill of Rights" sections consistent with labor law as to burden shifting on proximate causation and consistent with election law cases; and e) give lower

courts and litigants a fairer chance to craft jury instructions that will not require scrutiny on appellate review, (f) hold unions accoutable for their undemocratic behavior, (g) protect the public interest in democratic unions, (h) resolve the conflict of this case with decisions in other circuits, (i) balance non-interference in union policy against the goal of democratic organizations, and (j) prevent the LMRDA meaningful vote right of 29 U.S.C. §411(a)(1) from becoming "practically worthless."

Respectfully submitted

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APPENDIX

NOT RECOMMENDED FOR PUBLICATION

NO. 92-3616; 92-3678

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DAVID CHARLES DeLONG; STEVEN SCHNEIDER; ADRIENNE EDINGTON; ROGER WILHEM; LORETTA SHOEMAKER; BOBBIE GROSS; GARY L. DAY; PAUL M. SKILES,

Plaintiff-Appellants
Cross-Appellees,

v.

FILED AUG 20, 1993
L E O N A R D
GREEN, CLERK

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURALIMPLEMENT WORKERS OF AMERICA (UAW), et al.,

Defendant-Appellees
Cross-Appellants.

ON APPEAL FROM THE
UNITED STATES DISTRICT
COURT FOR THE SOUTHERN
DISTRICT OF OHIO

/

BEFORE: GUY and SUHRHEINRICH, Circuit Judges; JOINER, District Judge.*

PER CURIAM. In this labor action,

No. 92-3616; 92-3678

plaintiffs challenge the verdict holding defendants International Union, UAW (UAW), and K. Dan Jackson not liable for denying them a meaningful vote during the ratification of their collective bargaining agreement with Navistar International Transportation Corporation (Navistar). For the following reasons, we **AFFIRM**.

I.

In the early 1980's, Navistar experienced financial difficulties, which led it to negotiate a new collective bargaining agreement (CBA) with the UAW in early 1982. On April 29,

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*The Honorable Charles W. Joiner, United States District Judge for the Eastern District of Michigan, sitting by designation.

1982, Navistar and the UAW negotiators reached a tentative agreement. Along with the proposed CBA, the parties executed "Supplemental Letters of Understanding" (Supplemental Letters), which created a Master Recall List allowing employees who had lost their jobs due to plant closings to transfer to new openings, and to "dovetail" their seniority. Dovetailing means simply that the rehired employees would retain their prior seniority after transferring to new positions.

Immediately after the tentative agreements were reached, the process of ratification by the members of the UAW began. During the first phase of ratification, the bargaining representatives of the local unions met to review the proposed CBA, the Supplemental Letters, and the text of a "Highlighter"

which summarized various provisions of the CBA and Supplemental Letters. After reviewing these documents, the representatives approved the CBA and Supplemental Letters for ratification by the members of the UAW. During the second phase, the CBA and Supplemental Letters were put before the local unions for ratification. Local 402 met on May 1, 1982, and ratified the CBA and Supplemental Letters. The CBA and Supplemental Letters were ratified nationwide.

On February 24, 1984, plaintiffs filed a class action complaint, alleging labor law violations and breach of the CBA by the UAW, their representatives, and Navistar.[1] In Count two, the only claim at issue on appeal, plaintiffs claimed that

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[1]Navistar is not a party to this appeal.

Stephen Yokich, a vice president of the UAW,[2] and Jackson, chairman of the local Navistar negotiating committee, violated the Labor-Management Reporting and Disclosure Act (LMRDA), 29 U.S.C. § 411 (a) (1) by denying plaintiffs the right to meaningful vote in the ratification of the CBA and Supplemental Letters.[3] Plaintiffs

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[2]The district court directed a verdict in favor of Yokich which plaintiffs do not challenge.

[3]Section 411(a) (1) is part of the LMRDA's "bill of rights" for union members. It provides:

> Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates, to vote in elections or referendums of the labor organization, to attend membership meetings, and to participate in the deliberations and voting upon the business of such meetings, subject to

maintained that defendants had given them insufficient notice of the ratification meeting, and had disseminated misleading information to them at that meeting. Plaintiffs argued that due to the misinformation, they ratified the Supplemental Letters without realizing that their seniority rights would be harmed when rehired employees were dovetailed. Plaintiffs therefore sought damages to compensate them for lost salary

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> reasonable rules and regulations in such organizations's constitution and bylaws.

LMRDA, 29 U.S.C. § 411(a)(1). Courts have held that the right to vote under this section is not the simple right to cast a ballot, but the right to a "meaningful" vote, which requires "the dissemination of sufficient information so as to permit rank and file members to 'exercise their statutorily guaranteed right to an informed vote ....'" Corea v. Welo, 937 F. 2d 1132, 1140 (6th Cir. 1991) (quoting Blanchard v. Johnson, 532 F. 2d 1074, 1079 (6th Cir.), cert. denied 429 U.S. 834, and cert. denied, 429 U.S. 869 (1976)).

and benefits due to the adoption of the Supplemental Letters.

The district court held two trials, the second of which included count two. For that trial, the court certified a class "consisting of all current and former members of Local 402 who were entitled to vote at the May 1, 1982, ratification meeting." The court submitted count two to the jury on three special verdict interrogatories. The first interrogatory asked whether plaintiffs had proven by a preponderance that the UAW had violated their right to a meaningful vote under § 411 (a) (1). The second interrogatory asked the same question with respect to Jackson. The third interrogatory asked whether plaintiffs had

proven by a preponderance that the Supplemental Letters would not have been adopted nationally had plaintiffs' rights not been violated. The jury answered the first and second interrogatories affirmatively, but found that plaintiffs did not prove that the Supplemental Letters would not have been adopted nationally absent the misconduct. Based on the jury's answers, the court directed a verdict for defendants on count two.

Plaintiffs moved for judgment or new trial on count two, contending that interrogatory three misstated their burden of proof in making a prima facie case under § 411 (a) (1). Specifically, plaintiffs argued that they did not have to prove that absent the § 411 (a) (1) violations, the outcome of the national vote would have been different, but only the outcome may have been different.

The district court rejected this argument, and entered judgment in favor of defendants on court two.

II.

Plaintiffs argue that the district court misstated their burden of proof by requiring them to prove that the outcome of the national ratification would have been different absent the denial of a meaningful vote under § 411 (a) (1). However, we do not address plaintiffs' argument because they did not object to the district court's jury instruction on causation, and because the instruction does not constitute plain error.

Under Fed. R. Civ. P. 51, "[n]o party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury

retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection." Rule 51 can be satisfied by less than a formal objection, but only if the district court was clearly made aware of possible error in the instructions. Transcontinental Leasing, Inc. v. Michigan Nat'l Bank, 738 F. 2d 163, 167 (6th Cir. 1984).

The district court instructed the jury as follows with regard to count two:

> In order to prevail in their claim that any one or more or all of the Defendants violated their rights under or Section 411 (a) (1), the class must prove by a preponderance or greater weight of the evidence each of the following essential elements:
>
> 1. That one or both of the defendants denied the class the right to vote; and
>
> 2. That if the class had not been denied the right to vote, the Supplemental Letters of Understanding would not have been ratified nationally.

. . . .

> A class which seeks to hold a labor union or individual legally responsible on a claim that one or the other or both violated their rights to vote under Section 411 (a) (1) must also prove that the violation caused the harm of which the class complains. In this case, the class contends that the harm they suffered as a result of the violation . . . was the national ratification of the Supplemental Letters of Understanding. Therefore, [in addition to the violation], you must also decide whether that violation caused the Supplemental Letters of Understanding to be ratified nationally. (emphasis added.)

At the jury charge conferences, the district court went through the jury instructions section by section; all objections were made by the parties at the charge conferences and were incorporated into the trial record immediately after

the jury was instructed.

Plaintiffs maintain that they objected to the causation instruction, but a review of the transcripts of the conferences reveals no objection, formal or otherwise, to the instruction. Plaintiffs did seek to add some language explaining to the jury that if the Supplemental Letters had not been ratified, the previous local supplement on seniority would have continued in effect. The court rejected this language as surplusage, reasoning that absent ratification of the new Supplemental Letters the status quo would naturally continue meaning that the old supplement on seniority would continue to control. While plaintiffs argue that this objection somehow raised the causation issue, we disagree. This objection did not challenge in any way that portion of the jury

instructions which stated that plaintiffs had to prove "[t]hat if the class had not been denied the right to vote, the Supplemental Letters of Understanding would not have been ratified No. 92-3616; 9203678

nationally." (emphasis added).

Nor did plaintiffs object to special verdict interrogatory number three which asked: "Has the class proven by a preponderance or greater weight of the evidence that the Supplemental Letters of Understanding would not have been adopted nationally if they and the class they represent had not been denied their right to cast meaningful votes?" (emphasis added). Indeed, the court asked plaintiffs if they had "[a]ny problem with the interrogatories

. . .?" Plaintiffs' counsel responded

simply, "I didn't see any problems with them."

Absent any objection, we may review only for plain error, which we have defined as being both "obvious and prejudicial," and requiring action by this court "in the interests of justice." Chonich v. Wayne County Community College, 973 F. 2d 1271, 1275 (6th Cir. 1992); Fryman v. Federal Crop Ins. Corp., 936 F. 2d 244, 250 (6th Cir. 1991). While plaintiffs argue that they should be required only to prove that defendants' actions may have affected the outcome of the national vote, they have failed to provide, nor have we found, any authority clearly supporting this position. The cases relied on by plaintiffs involve either an entirely different statute, see Wirtz v. Hotel, Motel & Club Employees Union, Local 6, 391 U.S. 492, 505-09

(1968); Marshall v. Local Union 12447, 591 F. 2d 199, 205-06 (3rd Cir. 1978) (applying "may have affected" standard set forth in § 482 (c)); a different subsection of § 411 (a), see Kelly v. Local No. B-183, 566 F. Supp. 1199, 1201-02 (S.D.N.Y. 1983); Thompson v. Union of Flight Attendants, 109

L.R.R.M. 2870, 2874 (C.D. Cal. 1982); Hummel v. Brennan, 469F. Supp. 1180, 1191-93 (E.D. Pa. 1979) adopting "may have affected" standard of § 482 (c) in § 411 (a) (3) actions); or do not include any analysis of the issue raised by plaintiffs, see Fight Back Committee v. Gallagher, 120 L.R.R.M. 2372, 2374-75 (S.D.N.Y.), amended, 120 L.R.R.M. 2688 (S.D.N.Y. 1985) (mere use of "may have affected" phrase in § 411 (a) (1) action

with no rationale). Our review of this uncertain authority, individually and in totally, leaves us hard-pressed to conclude that the district court committed any error, let alone that such error was "plain" or "obvious." See Newport v. Fact Concerts, Inc., 453 U.S. 247, 256 (1981) (interpretation of evolving and uncertain law cannot amount to plain error). In light of plaintiffs' failure to object below and our conclusion that there was no plain error, we decline to address this issue on appeal.

III.

For the foregoing reasons, we **AFFIRM**.

Nos. 92-3616/3678

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DAVID CHARLES DELONG, ET AL.,)

Plaintiffs-Appellants/)
Cross-Appellees,)

V.

INTERNATIONAL UNION, UNITED)
AUTOMOBILE AEROSPACE &
AGRICULTURAL IMPLEMENT WORKERS
OF AMERICA (UAW), LOCAL 402,)
Defendant-Appellee/
Cross-Appellant,

JOHN MINCHIN, DECEASED,

Defendant-Appellee (92-3616)
Defendant (92-3678)

K. DAN JACKSON,)
Defendant-Appellee/
Cross-Appellant,)

NAVISTAR INTERNATIONAL
TRANSPROTATION CORP., f/k/a/
INTERNATIONAL HARVESTER COMPANY,)

Defendant-Appellee (92-3616),
Defendant (92-3678)

STEPHEN P. HOKICH,
Defendant-Appellee/
Cross-Appellant)

FILED
OCTOBER
5, 1993
LEONARD
GREEN,
CLERK

ORDER

BEFORE: GUY and SUHRHEINRICH, Circuit Judges; and JOINER, * District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court,

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*Hon. Charles W. Joiner, Senior United States District Judge for the Eastern District of Michigan, sitting by designation.

and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original

submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

_____

Leonard Green, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

DAVID C. DeLONG, et al.,	:	FILED MAY 7, 1993
Plaintiffs,	:	
vs.	:	Case No. C-3-84-135
INTERNATIONAL UNION, et al.,	:	
Defendants		Judge Walter Herbert Rice

DECISION AND ENTRY OVERRULING PLAINTIFFS' MOTION FOR JUDGEMENT OR FOR A NEW TRIAL (DOC. #303); THIS DECISION AND ENTRY IS NOT A FINAL APPEALABLE ORDER

This class action, brought by eight present and former employees of International Harvester Corporation, now Navistar International Transportation Corporation ("Navistar"), arises out of the financial difficulties which Navistar experienced in the early 1980's.[1] As a

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[1] Throughout this Decision, the Court will refer to Navistar by its current name.

result of those financial difficulties and the real fear that Navistar would be forced into bankruptcy, the Navistar Negotiating committee of the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America ("International Union" or "U.A.W."), in early 1982, opened negotiations on a new collective bargaining agreement ("CBA"), even though the CBA that was then in effect would not expire until October, 1982. The negotiations bore fruit. On April 29, 1982. The negotiating committee and Navistar reached tentative agreement on a new CBA. In addition to reaching tentative agreement on a new CBA, the parties, at the same time, executed Supplemental Letters

of Understanding ("Supplemental Letters") which created a Master Recall List, under

which union employees of Navistar who had lost their jobs as a result of plant closings or partial plant closings were allowed to transfer to openings at other Navistar facilities and to dovetail their seniority with or into that of employees at the facility to which they had transferred. Dovetailing refers to a process of retaining prior bargaining unit seniority when transferring to a new facility. The CBA and the Supplemental Letters were ratified nationally and by members of Local 402 of the International Union.

More than one year after the new CBA and the Supplemental Letters were ratified, Navistar and the U.A.W., on September 15, 1983, executed a letter ("September 15th letter") which resolved a grievance between them. Under the September 15th letter, a small number of

persons, who were on layoff when the plants from which they had been laid-off were closed, were allowed to transfer and to dovetail their seniority.[2]

On February 24, 1984, Plaintiffs initiated this action by filing their complaint.[3] After much preliminary jousting, Plaintiffs were directed to file a second amended complaint. In their second amended complaint (Doc. #103), filed on November 21, 1985, Plaintiffs alleged that

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[2]The evidence established that between 20 and 26 people have transferred to Navistar's Springfield facilities and dovetailed their seniority pursuant to the September 15th letter. Therefore, at most, 26 members of the putative class have been laid-off as a result of the September 15th letter.

[3]The individual Plaintiffs and the class they seek to represent are present or former members of Local 402 and present or former employees of Navistar at its Springfield, Ohio, plants.

Defendants[4] violated their rights under federal and state law by the process of negotiating the 1982 CBA and the Supplemental Letters and by the process by which they were ratified. In their second amended complaint, Plaintiffs alleged for the first time that the Defendants violated their rights by executing the September 15th letter. In its Decision of August 26, 1991 (Doc. #262), this Court reviewed the procedural history of this case up to that date. That review will not be repeated herein. At that time, two classes of claims remained.[5] First,

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[4]The Defendants are the International Union; Stephen Yokich ("Yokich"), a vice president of the International Union; Dan Jackson ("Jackson"), chairman of the Local 402 negotiating committee; and Navistar. The International Union, Yokich and Jackson will be referred to collectively as the "Union Defendants."

[5]Over a four-week period in the fall of 1987, a trial had been held on Defendants' statute of limitations defense

Plaintiffs had claims against the Union Defendants under § 101 (a) (1) of the LMRDA, 29 U.S.C. § 411 (a) (1), and the U.A.W. constitution arising out of the ratification of the 1982 CBA and the Supplemental Letters. Second, Plaintiffs had claims against all Defendants under § 301 of the LMRDA, 29 U.S.C. § 185, arising out of the September 15th letter.[6]

The Court bifurcated the trials of the two remaining classes of claims, with the claims under § 101 (a) (1) and the U.A.W.

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to Plaintiffs' hybrid § 301 claims, 29 U.S.C. § 185, arising out of the ratification of the CBA and Supplemental Letters. As a result of directed verdicts and the jury's answers to interrogatories, these claims were held to be barred by the statute of limitations.

[6]By separate Decision and Entry (Doc. #315), filed May 4, 1992, the Court sustained Defendants' motions for summary judgment directed at Plaintiffs' claims arising out of the September 15, 1983 letter.

constitution proceeding first.[7] The claims alleging a violation of § 101 (a) (1) and breach of the U.A.W. constitution were tried over a ten day period on October and November, 1991. The Court submitted the case to a jury on interrogatories.[8] See Doc. #298. This Court submitted six interrogatories to the jury. Three of the interrogatories (numbers 1, 2 and 3) related to Plaintiffs' § 101 (a) (1) claim, and the other three (numbers 4, 5 and 6) related to their claim under the

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[7]The Court certified these claims as a class action, with the class consisting of all current and former members of Local 402 who were entitled to vote at the May 1, 1982, ratification meeting. See Doc. #262 at 20.

[8]The Court has not yet entered judgment on the jury's answers to the interrogatories.

U.A.W. constitution.[9] Interrogatory number 1 asked the jury whether the class had proved by the preponderance of the evidence that the U.A.W. had violated their right to cast a meaningful vote during the May 1, 1982, ratification meeting.[10] Interrogatory number 2 asked the same question with respect to Jackson. The jury answered "yes" to both interrogatories 1 and 2. Interrogatory number 3 introduced the concept of proximate cause and asked the jury whether the class had proved by the preponderance of the evidence that the Supplemental Letters would have been adopted nationally if they had not been denied their

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[9]The jury interrogatories are Doc. #298.

[10]The denial of the right to cast a meaningful vote is a violation of § 101 (a) (1). See e.g., Nienbaber v. Ohio Valley Carpenters Dist. Council, 652 F. 2d 1284, 1286 (6th Cir. 1981).

meaningful right to vote by the U.A.W. and/or Jackson. The jury answered "no" to interrogatory number 3. Interrogatory number 4

asked the jury whether the class had proved by the preponderance of the evidence that the U.A.W. violated the U.A.W. constitution. Interrogatory number 5 asked the same question with respect to Jackson. The jury answered "yes" to both interrogatories 4 and 5. Interrogatory number 6, like interrogatory number 3, introduced the concept of proximate cause and asked the jury whether the class had proved by the preponderance of the evidence that the Supplemental Letters would not have been adopted nationally if the U.A.W. constitution had not been violated by the U.A.W. and/or Jackson. The jury answered "no" to interrogatory number

This case is now before the Court on Plaintiffs' motion for judgment, new trial and related relief (Doc. #303), arising out of the trial conducted in the fall of 1991, in which they seek to have the Court enter judgment, on the basis of the jury's answers to interrogatories, in their favor on their claims under § 101 (a) (1) and the U.A.W. constitution, or, in the alternative, to grant them a new trial on those claims.[1] The present motion involves interrogatories numbers 3 and 6,

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[1]In their motion, Plaintiffs alternatively ask the Court to enter a judgment as a matter of law in the Federal Rule of Civil Procedure. See Rule 50. A necessary predicate to such a motion is that the party seeking such relief must have moved for a directed verdict (now a judgment as a matter of law) at the close of the evidence. Rule 50 (b). Herein, the Plaintiffs did not request a directed verdict at the close of the evidence; therefore, the Court cannot grant the Plaintiffs a judgment notwithstanding the verdict.

as well as the Court's instructions relating to proximate cause. In those instructions (Doc. #296 at 3004 and 4003), the Court instructed the jury that, for either the U.A.W. and/or Jackson to be liable or legally

responsible to the class, the class had to prove that the alleged violation of their rights under § 101 (a) (1) and the U.A.W. constitution had caused the harm of which the class complained.[12] The Court also instructed the jury that the harm of which the Plaintiffs complained was the adoption of the Supplemental Letters; therefore, the Court told the jury to decide whether the violation of § 101 (a) (1) and/or the

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[12]Instructions 3004, which applied to the § 101 (a) (1) claim, and 4003, which applied to the claim under the U.A.W. constitution, are virtually identical.

U.A.W. constitution caused the Supplemental Letters to be adopted nationally.

Before discussing Plaintiffs' arguments in support of their motion and the responses of the U.A.W. and Jackson,[13] the Court will briefly set forth the nature of the claims that the class asserted in the phase of this case that went to trial in October and November of 1991. The claims tried in this phase of this case, as did most claims asserted herein, arose out of the ratification of the Supplemental Letters in May, 1982, with the creation of its Master Recall

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[13]At the close of Plaintiffs' case in chief, the Court directed a verdict on behalf of Yokich. With their motion for judgment (Doc. #303), the Plaintiffs do not challenge that decision. Additionally, Navistar was not a party to Plaintiffs' claims under § 101 (a) (1) and the U.A.W. constitution. Therefore, the U.A.W. and Jackson are the only Defendants against whom the present motion is directed.

list. In particular, Plaintiffs contended that the Supplemental Letters, by allowing Navistar employees who transferred into the Springfield plants to dovetail their seniority, harmed the seniority rights of the members of the class. Plaintiffs and the class they represented asserted that the manner

in which that meeting was conducted violated their right under § 101 (a) (1) to cast meaningful votes and their rights under the U.A.W. constitution. The Plaintiffs and the class sought to recover damages from the U.A.W. and Jackson in an amount which would compensate each member of the class for the difference in salary and benefits received after the adoption of the Supplemental Letters and the amount each would have received if the

Supplemental Letters had not bee adopted.[14]

In support of their motion for judgment or for a new trial (Doc. #303), Plaintiffs argue that proximate cause was not an element of their claims and, alternatively, that even if proximate cause was a element of those claims, interrogatories 3 and 6, and the Court's corresponding instructions (3004 and 4003) incorrectly defined the element of proximate cause.[15] Initially, the Court notes that it can sustain the motion, to

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[14]If the Plaintiffs had prevailed in this phase of the case, damages would have been determined at a subsequent proceeding.

[15]Although the Plaintiffs request the Court to enter judgment on both their § 101 (a) (1) claim and their claim for breach of the U.A.W. constitution, they have briefed only their claim under § 101 (a) (1). However, in this Court's opinion, the identical legal principles regarding proximate cause apply to both claims.

the extent that Plaintiffs seek to have the Court enter judgment on their behalf, only if proximate cause was not an element of their claims. In other words, if Plaintiffs were only required to prove that the U.A.W. and/or Jackson violated § 101 (a) (1) and/or the U.A.W. constitution (which the jury found that the class did prove) in order to recover damages, then the Court could enter judgment in favor of the

Plaintiffs even though they had failed to prove that the violations were the proximate cause of harm they claimed to have suffered. If, on the other hand, proximate cause was an element of their claims and the Plaintiffs are correct in their assertion that the Court incorrectly formulated the element of proximate cause, then they are entitled to a new trial

(rather than entry to judgment) with the jury being property instructed on that element.[16]

With respect to the argument that proximate cause is not an element of their claims, the Court simply rejects same. Plaintiffs have cited no authority to support the proposition that they may recover damages from the U.A.W. and Jackson without proving that the violation of their rights by the U.A.W. and Jackson proximately caused the damages they claim

[16]Initially, the U.A.W. and Jackson argue that Plaintiffs may not challenge the interrogatories because they failed to object to them at the appropriate point in the proceedings. See Rule 49; 5A Moore and Lucas, Moore's Federal Practice, ¶ 49.03 [2]. The Court does not presently have the benefit of a transcript of the jury charge conference. Accordingly, the Court will assume, arguendo, that the Plaintiffs adequately protected the record.

to have sustained.[17] On the courts

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[17]The Court does not read Christopher v. Safeway Stores, Inc., 476 F.Supp. 950 (E.D.Tex. 1979), affirmed, 644 F.2d 467 (5th Cir. 1981), as supporting the proposition that proximate cause is not an element of a claim under § 101 (a) (1). In Christopher, the plaintiffs alleged that their rights under § 101 (a) (1) were violated when seniority rules were altered, without their having had the opportunity to vote on the alteration. The district court held that while it was necessary to prove that the lack of a vote violated § 101 (a) (1), it was not necessary for the plaintiffs to prove that the seniority rights would not have been altered if there indeed had been a vote (In affirming, the appellate court did not address that question.). While the foregoing language might seem to imply that proximate cause is not an element of a claim such as the one at bar, the Christopher court did not ultimately suggest that proximate cause is not an element of a claim under § 101 (a) (1). See 476 F.Supp. at 955 ("The Union is responsible for all damages suffered by the Plaintiffs because of the violation of [§ 101 (a) (1)]..."). Although, the Christopher court's formulation of proximate cause was different from that of this Court and, as is discussed below, may support Plaintiffs' contention that this Court's formulation of the proximate cause element was not correct, it does not stand for the proposition that proximate cause is not an element of a claim under § 101 (a) (1). Fortunately, for those seeking

have consistently held that proximate cause is an element of a claim under labor laws. For instance, in McGraw v. United Associations of Journeymen, 341 F.2d 705, 710 (6th Cir. 1965), the Sixth Circuit held that proximate cause was a necessary element of a claim under § 101 (a) (4), 29 U.S.C. § 411 (a) (4). See also, Wood v. International Broth. of Teamsters, 807 F.2d 493, 502 (6th Cir. 1986) (Union is liable to member for breach of duty of fair representation "only if its breach was 'but-for' cause of those damages."); Deboles v. Trans World Airlines, Inc., 552 F.2d 1005 (3rd Cir. 1977); Maoilo v.

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wisdom in the published decisions of well intentioned trial courts, the less than precise Christopher decision, even if one were to conclude that it is indistinguishable from the case at bar on this issue, is not binding upon this Court.

Klipa, 655 F.Supp. 1139 (W.D.Pa. 1987). Cf. Reed v. United Transportation Workers Union, 488 U.S. 319 (1989).[18] Recently, Justice Scalia explained that "it has always been the practice of common law courts (and probably all courts, under all legal systems) to require as a condition of recovery, unless the legislature specifically prescribes otherwise, that the injury have been proximately caused by the offending conduct." Holmes v. Securities Protection Corp., 112 S.Ct. 1311, 1327 (1992)

(Scalia, J. concurring). Congress has not

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[18]In Reed, the Supreme Court held that claims under § 101 (a) (2), 29 U.S.C. § 411 (a) (2), were governed by a state's residual personal injury statute of limitations. In so concluding, the court noted the similarity between claims under § 101 (a) (2) and state personal injury claims. 488 U.S. at 32627. It is axiomatic that proximate cause is an element of a state personal injury claim.

stated that claims under § 101 (a) (1) or under a union constitution do not require proof of proximate cause.

Accordingly, the Court overrules that portion of Plaintiffs' motion in which they seek to have the Court enter judgment on their behalf. The Court now turns to Plaintiffs' contention (and that portion of their motion in which they request a new trial pursuant to Rule 59) that the Court did not properly formulate the element of proximate cause.[19]

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[19]A motion for new trial may be filed even though a court has not entered final judgment. Jurgens v. McKasy, 905 F.2d 382, 386 (Fed. Cir. 1990) (and cases cited therein at 386); Smith v. Hudson, 600 F.2d 60, 62 (6th Cir. 1979) (motion to alter or amend pursuant to Rule 59 [e]); 11 Wright & Miller, Federal Practice and Procedure, § 2812. Therefore, the Court may rule on Plaintiffs' motion, to the extent that it seeks a new trial, even though final judgment has not been entered on Plaintiffs' claims under § 101 (a) (1) and the U.A.W. constitution, or for that

In support of their argument that the Court improperly instructed the jury on proximate cause and required it to answer inappropriate interrogatories (numbers 3 and 6) regarding that element, the Plaintiffs rely on a number of cases decided under § 401 of the LMRDA, 29 U.S.C. § 481.[20] See e.g. Wirtz v. Hotel Employees, 391 U.S. 492 (1968). In Wirtz, the Supreme Court held that an election can be voided with proof that the violation of § 401 may have affected the outcome of the election. Thus, Plaintiffs argue that the Court should have instructed the jury, and had the jurors answer an interrogatory in light of that instruction, that

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matter any other of Plaintiffs' claims.

[20]Section 401 governs the election of union officials.

a violation of § 101 (a) (1) and/or of the U.A.W. constitution was the proximate cause of the harm they suffered if the violation may have affected the ratification vote in May, 1982, as opposed to the Court's instructions that the violation of § 101 (a) (1) and/or the U.A.W. constitution must have proximately caused the Plaintiffs' harm (the adoption of the Supplemental Letters), i.e. the Supplemental Letters would not have been adopted if the violation or violations had not occurred. The Court does not agree. Wirtz, a case decided under § 401 rather than under § 101 (a) (1) and/or a union constitution, defined proximate cause in such a manner because that is the way the term is defined by § 402 (c) of the LMRDA, 29 U.S.C. § 482 (c), which is applicable

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to cases brought under § 401.[21] Neither § 101 (a) (1) nor the U.A.W. constitution has such a provision.

In arguing that this Court's jury instructions on proximate cause were not correct, Plaintiffs also rely Christopher v. Safeway Stores, Inc., 476 F.Supp. 950 (E.D.Tex. 1979), affirmed, 644 F.2d 467 (5th Cir. 1981).[22] If one assumes that Christopher is not distinguishable, this Court declines to follow it. Simply stated, Christopher is not binding on this Court, having been decided in the Ninth

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[21]Section 402 (c) provides, in part:

> If, upon a preponderance of the evidence after a trail upon the merits, the court finds--
>
> * * *
>
> (2) that the violation of section 481 of this title [§ 401] may have affected the outcome of an election,
>
> the court shall declare the election, if any, void .....

[22]The facts of Christopher are set forth in footnote 17, above.

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Circuit, rather than in conformity with authnority of the

Sixth Circuit. Instructions 3004 and 4003 charged the jury on the "but-for" aspect of proximate cause, a standard which the Sixth Circuit has required. Wood, supra. Interrogatories numbers 3 and 6 sought the jury's findings on that issue. The Plaintiffs alleged that the U.A.W. and Jackson violated their rights under § 101 (a) (1) and the U.A.W. constitution during the ratification process regarding the Supplemental Letters in May, 1982. They claimed to have suffered damages because these violations led to the adoption of the Supplemental Letters which in turn diminished their seniority rights. Accordingly, the Plaintiffs would not be entitled to recover unless the violations caused the

change in seniority.

Based upon the foregoing, the Court concludes that it properly instructed the jury on the issue of proximate cause and that interrogatories numbers 3 and 6 did not require the members of the jury to answer inappropriate questions. Therefore, the Court concludes that Plaintiffs are not entitled to a new trial on their claims under § 101 (a) (1) and the U.A.W. constitution.[23]

Based upon all of the foregoing, the Court overrules Plaintiffs' motion for judgment, new trial or other relief (Doc. #303) in its entirety.

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[23]Plaintiffs have also argued that the Court improperly imposed the burden of persuasion, regarding proximate cause, upon them. That argument is simply wrong. Proximate cause in an element upon which the burden of persuasion is placed on a plaintiff.

This Decision and Entry is <u>not</u> a final appealable order. Rather, the Court will shortly file an order directing that judgment be entered on all claims set forth in Plaintiffs' second amended complaint (Doc. #103).

Walter Herbert Rice
UNITED STATES DISTRICT JUDGE

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IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO WESTERN DIVISION

DAVID C. DeLONG, et al.,	:	Filed May 8, 1992
Plaintiffs,	:	
vs.	:	Case No. C-3-84-135
INTERNATIONAL UNION, et al.,	:	
Defendants.	:	Judge Walter Herbert Rice

FINAL APPEALABLE ORDER DIRECTING THAT JUDGMENT BE ENTERED IN FAVOR OF THE DEFENDANTS AND AGAINST THE PLAINTIFFS DISMISSING PLAINTIFFS' SECOND AMENDED COMPLAINT (DOC. #103) WITH PREJUDICE; TERMINATION ENTRY

This class action arises out of the financial difficulties which International Harvester Corporation, now Navistar International Transportation Corporation ("Navistar"), experienced in the early 1980s.[1] As a result of those financial

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[1]Throughout this Decision, the Court will refer to Navistar by its current name.

difficulties and the real fear that Navistar would be forced into bankruptcy, the Navistar negotiating committee of the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America ("International Union" or "U.A.W."), in early 1982, opened negotiations on a new collective bargaining agreement ("CBA"), even though the CBA that was then in effect would not expire until October, 1982. The negotiations bore fruit. On April 29, 1982, the negotiating committee and Navistar reached tentative agreement on a new CBA. In addition to reaching tentative agreement on a new CBA, the parties, at the same time, executed Supplemental Letters of Understanding ("Supplemental Letters") which created a Master Recall List, under which union employees of Navistar who had lost their jobs as a

result of plant closings or partial plant closings were allowed to transfer to openings at other Navistar facilities and to dovetail their seniority. Dovetailing refers to a process of retaining prior bargaining unit seniority when transferring to a new facility.

Immediately after the tentative agreement was reached and the Supplemental letters were executed, the process of ratification by the members of the U.A.W. employed by Navistar began. On May 1, 1982, a ratification meeting was held in Springfield, Ohio, for members of the Local 402 of the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America ("Local 402"). Like Navistar's U.A.W. employees elsewhere, the membership of Local 402 ratified the new CBA and the

Supplemental Letters.[2]

On February 24, 1984, Plaintiffs initiated this action by filing their complaint.[3] After much preliminary jousting,[4]

Plaintiffs were directed to file a second amended complaint. In their second amended complaint (Doc.

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[2]The CBA and Supplemental Letters were ratified by separate votes. The Supplemental Letters were ratified in conjunction with a local agreement for Local 402.

[3]The individual Plaintiffs are members of Local 402 and employees of Navistar at its Springfield, Ohio, plants.

[4]Among the preliminary matters which the Court addressed was Plaintiffs' motion to realign (Doc. #57) Local 402 as a plaintiff. In The Plaintiffs' initial complaint, Local 402 was a defendant. The Court sustained the Plaintiffs motion to realign. See Doc. #98. Consequently, Local 402 has seen this case from both sides.

#103), Plaintiffs alleged that Defendants[5] violated their rights under federal and state law by negotiating and ratifying the 1982 CBA and the Supplemental Letters. Plaintiffs also alleged that the Defendants violated their rights by executing a certain letter on September 15, 1983. In particular, Plaintiffs set forth the following claims:

1. Count 1: a claim that the International Union and Navistar violated § 301 of the Labor-Management Relations Act ("LMRA"), 29 U.S.C. § 185, when the International Union breached its duty of fair representation to the Plaintiffs and Navistar breached its contractual obligations to the Plaintiffs;

2. Count 2: a claim that the International Union, Yokich and Jackson violated § 101(a)(1) of the Labor Management Reporting and Disclosure Act

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[5]The Defendants are in International Union, Stephen Yokich ("Yokich"), a vice president of the International Union, Dan Jackson ("Jackson"), chairman of the Local 402 negotiating committee, and Navistar. The Court will refer to the U.A.W., Yokich and Jackson, collectively, as the "Union Defendants."

("LMRDA"), 29 U.S.C. § 411(a)(1), by denying them the right to meaningfully participate in the May 1, 1982, ratification vote on the 1982 CBA and the Supplemental Letters;

3. Count 3: a claim that the International Union interfered with Local 402's right to independent counsel, thus limiting the ability of Local 402 and its members to institute an action to protect their rights under § 101(a)(1) of the LMRDA, in violation of § 101(a)(4) of the LMRDA, 29 U.S.C. § 411(a)(4), and 42 U.S.C. §§ 1981 and 1982;

4. Count 4: a claim that the Defendants deprived the Plaintiffs of their seniority rights without just compensation and without due process, in violation of the Fifth Amendment;

5. Count 5: a claim that the International Union and Navistar breached the 1982 CBA, the Supplemental Letters, the constitution between the International Union and Local 402, and the Supplemental Agreement on Seniority between Local 402 and Navistar, in violation of § 301 of the LMRA;[6]

6. Count 6: a claim that Yokich and Jackson engaged in conduct which violated § 501 of the LMRDA, 29 U.S.C. § 501;

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[6]This count, along with Count 1, sets forth Plaintiffs' claims with respect to the September 15, 1983 letter.

7. Count 7: a claim that the International Union tortiously interfered with the Supplemental Agreement on Seniority between Local 402 and Navistar, in violation of Ohio common law;

8. Count 8: a claim that the International Union and Navistar committed acts with constituted fraud, in violation of Ohio common law;

9. Count 9: a claim that Defendants breached the 1982 CBA, the Supplemental Letters, the constitution between the International Union and Local 402, and the Supplemental Agreement on Seniority between Local 402 and Navistar, in violation of Ohio common law;

10. Count 10: a claim that the Defendants deprived the Plaintiffs of their seniority rights without just compensation and without due process, in violation of the Ohio Constitution; and

11. Count 11: a claim that Yokich and Jackson breached the fiduciary obligations which they owed to the plaintiffs, Local 402 and the International Union, in violation of Ohio common law.

In addition to setting forth the foregoing claims, the Plaintiffs brought this action as a class action.

This litigation has resulted in numerous decisions by the Court and has

seen two jury trials. Both jury trials were certified as class actions. For the first trial, which lasted some four weeks in the fall of 1987, the Court certified a class consisting of the following classes and sub-subclasses:

(a) individuals attending the May 1, 1982, meeting and
(i) who were allegedly misrepresented to at that meeting thereafter; or
(ii) who were allegedly confused at the meeting; or
(iii) who were neither confused nor misrepresented to at that meeting or thereafter;
(b) individuals not at the May 1, 1982, meeting who knew of the meeting and
(i) who were not misrepresented to; or
(ii) who were misrepresented to;
(c) individuals not at the May 1, 1982, meeting who had no notice thereof, and who did not discover the fact of the meeting;
(d) individuals not at the May 1, 1982, meeting who had no notice thereof, and who did discover the fact of the meeting.

Doc. # 126 at 7-8. For the second trial,

which consumed a period of some ten (10) trial days in October and November of 1991, the Court certified a class "consisting of all current and former members of Local 402 who were entitled to vote at the May 1, 1982, ratification meeting." Doc. #262 at 26.

In its many decisions and two trials, the Court and two juries have addressed and have rejected all of the Plaintiffs' claims. In particular, the Court and the juries have disposed of Plaintiffs' claims in the following manner.

1. With respect to the claims in Count 1 of the second amended complaint, the following dispositions were made. First, with respect to that portion of Count 1 which sets forth claims arising out of the ratification of the CBA and Supplemental Letters in May, 1982, the Court entered summary judgment and dismissed the claims of the individuals in sub-subclasses a(ii), a(iii) and b(i), as being barred by the statute of limitations. Doc. #126 at 8-11. In September, 1987, the claims of the other members of the class proceeded to trial, on the question of whether their claims were barred by the statute of

limitations. At the conclusion of the Plaintiffs' case, the Court sustained Defendants' motions for directed verdict as to the claims of the members of sub-subclasses a(i) and b(ii) and subclass (d). The jury found in favor of Defendants with respect to the members of subclass (c). Doc. #172. Second, with respect to that portion of Count 1 which sets forth claims arising out of the September 15, 1983, letter, the Court sustained Defendants' motions for summary judgment and dismissed those claims. Doc. #315.

2. With respect to the claims in Count 2 of the second amended complaint, these claims were part of the second trial in this case, tried during October and November, 1991, as a class action. The Court submitted these claims to the jury on interrogatories.[7] The jury answered the interrogatories (Doc. #298 at 1-3), and, based upon those answers, the Court directs that judgment be entered in

favor of the Union Defendants[8] and against Plaintiffs and the class which was certified dismissing, with prejudice, the Plaintiffs'
claims that the Union Defendants violated 29 U.S.C. § 411(a)(1) in the manner in which the 1982 CBA and Supplemental

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[7]The Court directed a verdict in favor of Yokich.

[8]Count 2 did not assert claims against Navistar.

Letters were ratified in May, 1982.[9]

3. With respect to the claims in Count 3 of the second amended complaint, the Court dismissed the claims set forth in this count. Doc. #126 at 20-21 (claims under 42 U.S.C. § 1981 and § 1982) and Doc. #184 at 16-17 (claims under 29 U.S.C. § 411[a][4]).

4. With respect to the claims in Count 4 of the second amended complaint, the Court sua sponte dismissed these claims. Doc. #126 at 21-22.

5. With respect to the claims in Count 5 of the second amended complaint, the following dispositions were made. First, with respect to that portion of Count 5 which sets forth claims arising out of the ratification of the CBA and Supplemental Letters in May, 1982, the Court entered summary judgment and dismissed the claims of the individuals in sub-subclasses a(ii), a(iii) and b(i), as being barred by the statute of limitations. Doc. #126 at 8-11. In September, 1987, the claims of the other members of the class proceeded to trial, on the question of whether their claims were also barred by the statute of limitations. At the conclusion of the Plaintiffs' case, the Court sustained Defendants' motions for directed verdict as to the claims of the members of sub-subclasses (a)(i) and b(ii) and subclass

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[9]With respect to these claims, the court has overruled Plaintiffs' motion for judgment, new trial or other relief. See Doc. #316.

(d). The jury found in favor of Defendants with respect to the members of subclass (c). Doc. #172. Second, with respect to that portion of Count 5 which sets forth claims arising out of the September 15, 1983, letter, the Court sustained Defendants' motions for summary judgment and dismissed those claims. Doc. #315.

6. With respect to the claims in Count 6 of the second amended complaint, the Court dismissed these claims. Doc. #184 at 18-19.

7. With respect to the claims in Count 7 of the second amended complaint, the Court dismissed these claims. Doc. #184. at 19-21.

8. With respect to the claims in Count 8 of the second amended complaint, the Court dismissed these claims. Doc. #184 at 21-22.

9. With respect to the claims in Count 9 of the second amended complaint, the Court dismissed all claims in that count except for

those in which Plaintiffs alleged that the Union Defendants violated the U.A.W. constitution in the method in which notice was given regarding the May, 1982, ratification meeting and the manner in which that meeting was conducted.[10]

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[10]The remaining portion of Count 9 did not assert claims against Navistar.

Doc. #184 at 22-24. The remaining claims were part of the second trial in this case, tried during October and November, 1991, as a class action. The Court submitted these claims to the jury on interrogatories.[11] The jury answered the interrogatories (Doc. #298 at 4-6), and, based upon those answers, the Court directs that judgment be entered in favor of Defendants and against Plaintiffs and the class which was certified dismissing, with prejudice, the Plaintiffs' claims that the Union Defendants violated the U.A.W. constitution in the manner in which the 1982 CBA and Supplemental Letters were ratified in May, 1982.[12]

10. With respect to the claims in Count 10 of the second amended complaint, the Court dismissed these claims. Doc. #184 at 25.

11. With respect to the claims in Count 11 of the second amended complaint, the Court dismissed these claims. Doc. #184 at 25-26.

Based upon the foregoing, the Court now directs that a final appealable

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[11]The Court directed a verdict in favor of Yokich.

[12]With respect to these claims, the Court has overruled Plaintiffs' motion for judgment, new trial or other relief. See Doc. #316.

judgment be entered in favor the Defendants and against Plaintiffs and the class (with respect to those claims which the Court certified as maintainable as a class action.) dismissing all claims with prejudice.[13]

-8-

The captioned cause is hereby ordered terminated upon the docket records of the United Stated District Court for the Southern District of Ohio, Western Division, at Dayton.

WALTER HERBERT RICE
UNITED STATES DISTRICT JUDGE

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[13]The Court certified the portions of Counts 1 and 5 relating to the ratification of the CBA and Supplemental Letters in May, 1982, Count 2 and the portion of Count 9 relating to the violation of the U.A.W. constitution arising out of the ratification of the CBA and Supplemental Letters in May, 1982, as maintainable as a class action. See Docs. #126 and #262.

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Supreme Court, U.S.
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(2)

No. 93-1072

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

DAVID CHARLES DELONG, *et al.*,
Petitioners,
v.
INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

STATEMENT OF THE CASE

In early 1982, the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (the "UAW") and International Harvester Corporation (now called "Navistar") reached tentative agreement on a new national collective bargaining agreement. In order to address the rapid contraction of Navistar's workforce and the closing of several of Navistar's manufacturing facilities, that tentative agreement created a "Master Recall List." Employees on that list who were permanently laid-off as a result of a plant closing were allowed to transfer, with full seniority rights, into other Navistar facilities. The Master Recall List was reflected

in a document entitled "Supplemental Letters of Understanding."

The tentative agreement was presented to the elected leadership of the 24 UAW Local Unions representing Navistar employees at facilities scattered across the United States. At that meeting, the terms of the new contract—including the Supplemental Letters of Understanding—were explained in detail. The elected local union leaders approved the tentative agreement. The agreement was thereafter presented to the membership for ratification and was ratified by a vote of 7,086 to 3,949. At Local 402, which represents the employees in Springfield, Ohio, the vote was 948 in favor and 842 opposed.

Nearly two years later, eight UAW-represented Navistar employees from the Springfield facilities (hereafter "Plaintiffs" or "Petitioners") filed the present suit charging the UAW with, *inter alia,* failure to provide them and their fellow employees in Springfield with adequate information prior to the vote on the new national agreement. That failure, it was alleged, violated Title I of the Landrum-Griffin Act which provides, in relevant part, that union members must be provided with "equal rights and privileges . . . to vote in elections or referendums of the labor organization." 29 U.S.C. § 411(a)(1).

Following lengthy pre-trial proceedings and the disposal of several other issues raised in the Complaint, the case was tried before a jury. The district court presented six special interrogatories to the jury, three of which involved the allegation that the UAW provided inadequate information prior to the vote in 1982. The first two of those interrogatories requested the jury to decide whether the defendants had denied Plaintiffs "the right to cast meaningful votes." The third interrogatory asked the jury whether Plaintiffs had "proven by the preponderance or greater weight of the evidence that the Supplemental Letters of Understanding would not have been adopted na-

tionally if [union members in Springfield] had not been denied their right to cast meaningful votes." (App. A-14) The jury instructions on this issue stated that Plaintiffs were required to prove that "if the [union members in Springfield] had not been denied the right to vote, the Supplemental Letters of Understanding would not have been ratified nationally." (App. A-11) In other words, the jury was instructed that the Plaintiffs were required to show that the harm they allegedly suffered (adoption of the Master Recall List) was caused by the union's allegedly illegal conduct.

Plaintiffs were provided a full opportunity to participate in the crafting of the jury instructions. In fact, in response to a direct question from the trial court regarding whether Plaintiffs had "[a]ny problem with the interrogatories," Plaintiffs' counsel responded that he "didn't see any problems with them." (App. A-14-15) Plaintiffs did *not* object to these jury instructions or to the special interrogatories.

The jury answered the third interrogatory in the *negative,* determining that the Plaintiffs had failed to prove the necessary causal relationship between any inadequacy in the pre-vote information and the otucome of the vote. In other words, the jury found that any improprieties in the conduct of the election had been "harmless" and had not affected the outcome of the national ratification vote.

After the District Court entered judgment for the UAW based on the jury's responses to the interrogatories, Plaintiffs appealed to the Sixth Circuit. The Sixth Circuit affirmed on the ground that Plaintiffs had not objected to the jury instructions and, under Fed. R. Civ. Pro. 51, were therefore precluded from basing an appeal on any alleged error of law in those instructions.

REASONS FOR DENYING THE WRIT

The Sixth Circuit decided a single issue: that Fed. R. Civ. Pro. 51 prohibits Plaintiffs from raising a legal challenge to a jury instruction to which Plaintiffs had *not* objected during the trial. Since Plaintiffs had failed to preserve the Landrum-Griffin Act Title I causation issue by objecting to the jury instructions on that issue, the Sixth Circuit "declin[ed] to address" the Plaintiffs' claim that the jury instructions and interrogatories incorrectly characterized the causal link that Plaintiffs were required to establish. (App. A-17).

Petitioners ignore the holding of the Sixth Circuit and attempt to present this Court with the very causation issue that the Sixth Circuit "declin[ed] to address." As we now show, the Sixth Circuit correctly applied Fed. R. Civ. Pro. 51 to the facts of this case and its decision on that mundane procedural question raises no issue worthy of this Court's attention. It is equally plain that there is no reason for this Court to review a Landrum-Griffin Act issue which Plaintiffs failed to properly raise in the district court and which the Court of Appeals found not to be properly presented.

1. The Sixth Circuit was plainly correct in holding that Plaintiffs' failure to object to the jury instructions on causation during trial forecloses raising that issue on appeal. Fed. R. Civ. Pro. 51 provides, *inter alia,* that "[n]o party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection."

The Sixth Circuit's holding in this case was thus nothing more than an entirely straightforward exercise in the application of Fed. R. Civ. Pro. 51. Applying the plain language of that Rule, the Sixth Circuit found that Plaintiffs were barred from raising on appeal an alleged defect in a jury instruction to which they had not objected during the trial.

2. Fed. R. Civ. Pro. 51 is subject to a narrow exception; failure to raise an objection will be overlooked when doing so is necessary to avoid "plain error." *City of Newport v. Fact Concerts,* 453 U.S. 247, 256 (1981). If Plaintiffs' lengthy argument on the merits of the Landrum-Griffin Act Title I causation issue is construed as an argument that the Sixth Circuit erred by failing to apply this "plain error" exception to the general rule prescribed by Fed. R. Civ. Pro. 51, that argument fails.

The court below briefly addressed the "plain error" exception to Rule 51 and correctly concluded that the district court's causation determination did not constitute "plain error." In fact, the court below was unable to find "any authority clearly supporting" Plaintiffs' argument on the causation issue (App. A-15) and was therefore "hard-pressed to conclude that the district court had committed any error, let alone that such error was 'plain' or 'obvious'." (App. A-17).

A. The Sixth Circuit's reading of applicable law on the merits of the causation issue was entirely correct.

Our research has not revealed any appellate court decisions addressing the causation issue in the context of Title I challenges to union ratification votes.

There are, however, several cases addressing that issue in the context of challenges to ratification votes based on claims that alleged union misrepresentations during the ratification process violated the duty of fair representation.[1] Each of those cases holds that plaintiffs are re-

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[1] Under the duty of fair representation, a union is required to avoid conduct which is "arbitrary, discriminatory or in bad faith." *Vaca v. Sipes,* 386 U.S. 171, 190 (1967). The duty of fair representation applies to contract negotiation as well as administration. *Air Line Pilots v. O'Neill,* —— U.S. ——, 111 S.Ct. 1127 (1991). Misrepresentations during contract ratification procedures have been universally held to violate a union's duty of fair representation. *Anderson v. United Paperworkers,* 641 F.2d 574, 576-78 (8th Cir. 1981); *Deboles v. Trans World Airlines,* 552 F.2d 1005, 1018 (3rd Cir.), cert. denied 434 U.S. 837.

quired to establish the same kind of causal link between the alleged misrepresentation and the outcome of the ratification process as the district court required here.

In *Deboles v. Trans World Airlines*, 552 F.2d 1005, 1019-20 (3d Cir. 1977), for example, the Third Circuit applied traditional notions of proximate causation to conclude that "[t]here is no liability . . . where false statements by union officials . . . did not materially affect the result of the subsequent ratification vote." The court therefore refused to order any remedy where the misrepresentations had been determined not to have caused the ratification results. See also, *Acri v. Machinists*, 781 F.2d 1393, 1397 (9th Cir. 1986) ("[P]laintiffs must establish a causal relationship between the alleged misrepresentation and their injury.") *Ackley v. Teamsters*, 959 F.2d 1463, 1472 (9th Cir. 1992) ("[T]o prevail in a misrepresentation case—and thus in a non-disclosure case—plaintiff must demonstrate a 'causal relationship between the alleged misrepresentations and their inquiry' " [quoting *Acri, supra*]. In other words, plaintiffs must show that "absent the misrepresentation, the outcome of the ratification vote would have been different." *Id.*)

In the present case, the jury concluded that Plaintiffs had failed to demonstrate that the alleged misrepresentations had caused the adoption of the Master Recall List. The district court therefore concluded that Plaintiffs had failed to establish the necessary causal link between the alleged misrepresentation and the harm they claim was visited upon them. As the Sixth Circuit found, the district court's decision is thus entirely consistent with existing caselaw regarding challenges to the conduct of ratification votes.

B. Petitioners' invocation of the authority of *Wirtz v. Hotel, Motel and Club Employees Union*, 391 U.S. 492 (1968) is misplaced. *Wirtz* involved a claim that an election of an union officer was fatally flawed because of a union rule limiting the potential candidates for office to

those who had held other elected positions. *Wirtz* is different from the present case for two separate dispositive reasons.

First, *Wirtz* dealt with an entirely different regulatory scheme. Title IV of the Landrum-Griffin Act, at issue in *Wirtz*, regulates elections for union office in detail.[2] Moreover, Title IV specifies the circumstances under which re-run elections may be ordered: an election may be ordered re-run if, *inter alia*, a federal district court determines that the conduct of the election violated Section 481 and "that the violation of Section 481 . . . may have affected the outcome of [the] election." 29 U.S.C. § 482(c).

Title I, on the other hand, which is the sole statutory provision at issue here, specifies only that all union members must be accorded "equal rights and privileges . . . to vote in elections or referendums of the labor organization." 29 U.S.C. § 411(a)(1). Ratification votes on proposed contracts are not mandated by Title I, must less are the specifics of such votes governed by statutory law.

Thus, in the context of Title IV's mandated and heavily regulated elections for union officers, the *Wirtz* Court determined that—since all the ballots issued in the election reflected the impermissible narrow candidacy qualifications—those candidacy qualifications "may have affected" the outcome of the election.

In the context of Title I challenges to ratification votes, in contrast, Congress chose not to incorporate the "may have affected" standard of proof. It is therefore entirely appropriate to apply the more traditional notions of proximate causation followed in the closely related duty of fair representation jurisprudence described above.

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[2] That statute requires periodic secret ballot election of various officers of both national and local unions, mandates the availability of mailing lists to all "bona fide candidates," requires election observers, and regulates many other aspects of elections for union leadership position. 29 U.S.C. § 481(a)-(g).

Second, there is an important distinction between the type of election impropriety at issue in *Wirtz* and that at issue here. In *Wirtz*, the impropriety involved an inability of candidates to run for office. In the present case, in contrast, the alleged impropriety involves an isolated failure to provide adequate information to a defined subgroup of voters.

In *Wirtz*, there was no way to show that the "taint" resulting from the impermissible restriction was confined to a particular number of votes or potential voters. The flaw necessarily infected every ballot because every ballot reflected the truncated list of candidates. In the present case, in contrast, the "taint" involves allegations that inadequate information was provided to the members of only one Local Union, out of a total of 24 Local Unions.

In the present case, therefore, it is in fact very likely that the "taint" is limited to those voters who voted in Springfield and that the voters at other locations were not affected by the alleged improprieties which occurred in Springfield. If, in fact, that is what happened, there is no reason to overturn the results of the national vote which the Springfield votes were mathematically incapable of altering. And if that is not what happened, Plaintiffs were entitled to prove the facts showing a broader effect to the jury. Such an exercise in containment is impossible in the *Wirtz* setting but is entirely appropriate in the present context. For precisely that reason, the causation rule followed here is sound; it is certainly not "plain error."

In sum, Plaintiffs' argument that the trial court erred in failing to expand the *Wirtz* reasoning to cover cases in which the election improprieties affected only a sub-group of voters comes far too late and the Court of Appeals was correct in determining that the jury instructions—to which Plaintiffs failed to object—did not constitute "plain error."

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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No. 93-1072

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1993

DAVID CHARLES DeLONG, *et. al.*,

Petitioners,

vs.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, *et. al.*,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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I. WIRTZ IS APPLICABLE: The key distinction Respondents raise to distinguish *Wirtz v. Hotel, Motel and Club Employees Union,* 391 U.S. 492 (1968) is that any "taint" on the vote taken on the collective bargaining agreement at issue was created, by actions towards "members of only one Local Union, out of a total of 24 Local Unions." (Brief in Opposition, page 8). Plaintiffs sought to present trial testimony of Donald Joseph Clift, and his brother, both members of Local 98, UAW, in Indianapolis, Indiana, regarding facts constituting basis for their class action suit initiated on behalf of Local 98 members because of similar LMRDA violations denying meaningful vote at that local on the identical collective bargaining agreement at issue in this case. Their LMRDA denial of meaningful right to vote claim was before this court

on a pending certiorari petition in 1987 (No. 87-42) when this Court decided *Reed v. United Transp. Union,* 488 U.S. 319 (1989), as noted in footnote 3 therein.

Counsel of Record for Respondents at that time vigorously and successfully opposed presentation of Clifts' testimony relying upon Fed. R. of Evid. 403, arguing that the relevance was outweighed by possible prejudicial effect, because the jury might be confused by essentially hearing allegations of two separate lawsuits. Plaintiff's contention was that this testimony was necessary to prove that there was a concerted national effort by the UAW to deny LMRDA meaningful vote rights of all of the more than 19,000 laid-offs, then constituting over half the members of UAW through-out the Navistar nationwide chain. Thus contrary to Respondent's assertions, Plaintiffs were

held *not* "entitled to prove the facts showing a broader effect to the jury." (Id. at page 8). Plaintiffs were therefore obliged to proffer this testimony.

Petitioners do agree with Respondents that "it is entirely appropriate to apply the more traditional notions of proximate causation... " (Opposition Brief page 7) for purposes of LMRDA law, but disagree that the area of law to be followed should be fair representation. This Court noted in *Wirtz* that "Congress' model of democratic elections was political elections in this country..." for the LMRDA. (*Wirtz, supra,* at 391 U.S. 504) The Petition on pages 18-19 demonstrates burden shifting in the context of public elections is the norm. In light of the fundamental nature of voting rights, it would be inconsistent for this Court to adopt state limitation of action periods

for LMRDA cases as in *Reed*, (where it refused to apply fair representation cases) and yet apply fair representation caselaw to proximate cause when LMRDA, election law generally, and other labor law affecting fundamental rights like speech (see pages 19-22 of Petition), burden shifting of proximate causation is the "traditional notion.

II. THIS WAS A NATIONAL VIOLATION: Respondents persist in claiming the Local 402 Springfield voters were "mathematically incapable of altering" the national outcome (*Id* at page 8). Yet Respondents' own numbers admit that the national vote ratifying the contract was "7,086 to 3,949", (which included the Local 402 vote) and Local 402's vote was "948 in favor and 842 opposed." (*Id* at page 2) Backing the Local 402 vote out of the national vote, the contract passed at

other locals (including the tainted Local 98) by a vote of 6138 to 3107. The Plaintiff class undisputed to be 4540 people, could have affected the outcome. A massive negative vote at Local 402 was entirely *likely*, as Local 402, *like Local 98* according to Clifts, had a Local Supplement on Seniority that Plaintiffs demonstrated to the jury prevented alteration by a national vote on seniority issues. This proposed addition to the proximate cause jury instruction was intended to cause the jury the assess the impact of violation of the Local 402 Supplement on Seniority as to voter behavior. The very essence of Petitioners LMRDA Claim and thereby the purpose of the proposed addition to the proximate cause jury instruction was that Local 402's Local Supplement on Seniority was its "Bible" on seniority that should not be

modified by a national vote without knowing consent by meaningful vote of Local 402 members, and that had these 4540 members become aware the Local Seniority Supplement was at risk, a massive turn-out to vote against the national contract would have proximately resulted.

The false light Respondent seeks to create that this proven denial of meaningful vote right was a local phenomenon becomes transparent considering Respondents' false claim that the *proven* "taint" in the vote process "is limited to those voters who voted in Springfield and that the voters at other locations were not affected by the alleged improprieties which occurred in Springfield...." (Id at page 8). The key to understanding this misrepresentation is again the Clift brothers at Local 98 in Indianapolis. The *Clift v. UAW* certiorari petition was one

case of many in conflict as to whether to apply fair representation statute of limitation caselaw to LMRDA claims. The Clift file in the Clerk's Office provides a full understanding, but in that Petition, Clifts claimed:

> On May 2, 1982, a special meeting was called to ratify the supplements negotiated between the respondents. No notice of the meeting was provided to approximately Three Hundred Fifty (350) employee/members who were on layoff from Harvester at that time. Furthermore, all employee/members who had been on layoff for more than six (6) months, and many employee/members who had been on layoff for less than six (6) months, were, by Union Executive Order, <u>specifically</u> denied the right to vote at the meeting.

There were a total of 614 Local 98 members denied a meaningful vote, totalled 614, and that number may be factored in the above national count as the Clifts stated in their Petition:

> "Master Recall" was ratified by a vote of Two Hundred Thirty-five (235) for and One Hundred Twenty-nine (129) against. Clearly, the votes of the

> Three Hundred Fifty (350) employee/members who were denied the right to vote and who were adversely affected by any changes in "Master Agreement", pertaining to layoff and recall seniority rights, would have had a substantial impact on the outcome of the ratification vote.

As Respondents are well aware, the *Clift* LMRDA claim case is still pending for trial. Accepting this petition would assist the Seventh Circuit in dealing with the issue of proximate causation. Petitioners herein have cited and quoted the Court's opinion in *Reea* extensively in their Petition for Writ of Certiorari as authority for the proposition that fair representation caselaw has little or no bearing on LMRDA caselaw. Yet Respondents still persist in arguing fair representation caselaw and not LMRDA caselaw should apply. Respondents convinced the trial court and Sixth Circuit on this erroneous legal position.

(Brief in Opposition on page 5). Indeed, Respondents claim they could uncover no cases addressing the causation issue in the context of Title I challenges to union ratification votes when in fact, Petitioners have cited numerous such cases on pages 24-32 of the Petition, the key case being *Bauman v. Presser,* 117 LRRM 2393 (D.D.C. 1984) which oddly neither the trial court, the Sixth Circuit, nor Respondents have *ever* mentioned.

III. ANY WAIVER IS EXCUSABLE: But assuming this want of authority to be the case, *Reed* still requires that LMRDA be viewed as a distinct area of statutory law necessitating analysis quite separate and different from fair representation cases. Continuing with the claimed assumption there is no LMRDA precedent on causation, Petitioners' argument that *City of Newport v. Fact Concerts Inc,* 453 U.S. 247 (1981)

should apply excusing any claimed waiver under Fed. R. of Civ. Pro. 51 becomes even stronger, as this case clearly presents to the Court an issue like that in *Newport* that is "novel, important and likely to recur" (see analysis on pages 49-52 of Petition).

Respondents leap to the conclusion that Fed. R. Civ. Pro. 51 requiring objection "is subject to a narrow exception", i.e. "plain error". (Brief in Opposition at page 5). Yet the Sixth Circuit failed to properly apply the "plain error" doctrine by wrongly concluding *Newport* prevents applying that doctrine if law is evolving, when in fact *Newport* created an entirely different and broader exception to requiring objection where the issue is "novel, important and likely to recur".

Citing *Newport*, the First Circuit

has held that the federal courts "had recently been advised not to limit ourselves to plain error rulings in cases of improper district court practices of broad consequence, *but to exercise our supervisory powers...*" *U.S. v. Martinez-Torres*, 912 F.2d 1552 at 1554 (1st Cir. 1990) (Emphasis supplied). The Second Circuit has held an appellate court may also consider whether an instruction was proper despite no objection if the issue is a "novel" issue of law, and that thereby the reviewing Court is not restricted to the plain error standard. *Getty Petroleum Corp. v. Bartco Petroleum Corp.*, 858 F.2d 103 (2nd Cir. 1988), *cert. denied*, 109 S.Ct. 1642 (1989). Yet the Sixth Circuit did not address this point at all, and actually turned *Newport* on its head by using it as a constraint to the "plain error" doctrine when *Newport*

actually carves out an *exception* to the strict application of the plain error doctrine. *Earl v. Bouchard Transp. Co., Inc.*, 917 F.2d 1320 at 1324 (2d Cir. 1990) at 1324. The Sixth Circuit reversed the very intent of the Supreme Court's holding in *Newport* that the federal courts were not limited to the "plain error" doctrine to excuse waiver, and wrongly used *Newport* to restrictively confine any excuse to the use of the plain error doctrine, and then bar the use of that doctrine if the law is "uncertain" or evolving.

In *St Louis v. Praprotnick*, 485 U.S. 112 (1988) (plurality opinion), *Newport* was relied upon to permit review despite lack of objection to define the proper legal standard for determining when isolated decisions by municipal employees may expose the municipality itself to liability under 42 U.S.C. Section 1983.

This Court emphasized that the lower court did pass on the issue, and that review would give lower courts and litigants a fairer chance to craft jury instructions that will not require scrutiny on appellate review. The trial court did pass on the proximate cause issue in this case.

The reference by the Sixth Circuit, (page A14-15 of Appendix) to discussion between the trial court and Plaintiffs' counsel regarding the interrogatories to the jury, neglects the overall approach of the trial court. The Sixth Circuit did recognize (page A-13 of Appendix) that Plaintiffs had indeed sought to have additions made to the proximate cause instruction presented at the end of the trial, which as noted above related to impact on the national vote. Despite Plaintiffs' argument that the discussion regarding proposed additions to the charge

clearly evidenced in context an objection to this instruction, the Sixth Circuit wrongly *interpreted* the transcript to be that Plaintiffs merely sought to add surplus language to the charge. When the interrogatories were submitted to the jury at the close of the jury charge there was also this exchange (508 of the Joint Appendix filed with the Sixth Circuit):

> THE COURT: Fellas, I'm assuming at this time that you are renewing all objections previously made to the charge that were overruled during the charge conference. I'm assuming that *you are renewing all requests to instruct that were overruled.*
> Now, what I have done is *I have just incorporated the charge conference into the appropriate portion of the trial* once the instructions have been given.
> *In addition to that,* are there any objections to the charge, suggested, or deletions, Mr. Pennington? (Emphasis supplied)

Petitioners claim the lengthy aforementioned arguments regarding suggested additional jury instruction

language about the Local Supplement on Seniority and its effect on voter behavior and thereby proximate causation were "renewed" by the court in this statement and further applied to the interrogatories by "incorporation" due to the guarantee of the trial judge that those objections and suggested additions were "incorporated ... into the *appropriate portion* of the trial (i.e. the interrogatories). The court clearly was referring to the interrogatories as it distinguishes the jury *instructions*.

To expect weary trial counsel to formulate an elaborate specific objection precisely raising a novel issue of law at the close of a three week trial in which only liability was to be tried (and thus only liability thoroughly researched) pursuant to an oral bifurcation order of the trial judge on the telephone shortly

before trial, with no further directions, written or oral, regarding proximate causation in the context of bifurcation, demonstrates "interests in effective trial administration advanced by Rule 51" would not be served (*Newport, supra* at 453 U.S. page 256) and bifurcation "seriously affected the fairness, integrity or public reputation of a judicial proceeding" (*Newport, supra*, 453 U.S. at 254). It also violated the obligation of the trial court to recognize when bifurcating issues that "whatever the specific subject matter, however, it appears to be a *sine qua non* of bifurcation that the various phases or trial segments be sharply defined and that the definition be well understood by the parties and by the Court." *United States v. Am. Tel. & Tel. Co.*, 83 F.R.D. 323 at 335 (D.D.C. 1979).

This Court should ask, as it did in

Newport, how would the "interests in effective trial administration advanced by Rule 51...be served.." (*Newport, supra* at 453 U.S. p. 256) when Petitioners are forced to accept a Pyrrhic victory and sees a wrongdoer get away while the legal system eludes analysis of novel legal issues in a changing legal climate that rightfully should be made clear? Even the Sixth Circuit even recognized LMRDA caselaw on proximate causation as "uncertain authority" (Appendix p. A-17). Comparing the juridical significance of the proximate cause issue at hand against the issue in *Newport* and other decisions like it, the Court should discern much more is at stake here.

CONCLUSION: In the circumstances, relying upon Respondents' palpably false assertions that the violations affected only one out of 24 Local Unions, and that

the "taint" was an isolated exception rather than the rule, would risk a major disservice to this case and future litigation. Not accepting certiorari to consider formulating law regarding burden of proof allocation on such a speculative fact as voter turnout and voting behavior would risk rendering the LMRDA remedy *"practically worthless"*.

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